

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

CAMPAIGN FOR SOUTHERN EQUALITY, ET AL. PLAINTIFFS

VS. CIVIL NO. 3:14CV818-CWR-LRA

PHIL BRYANT, IN HIS OFFICIAL CAPACITY
AS GOVERNOR OF THE STATE OF MISSISSIPPI, ET AL. DEFENDANTS

**ARGUMENT ON MOTION FOR PRELIMINARY INJUNCTION AND
CONTINGENT MOTION FOR STAY PENDING APPEAL**

BEFORE THE HONORABLE CARLTON W. REEVES
UNITED STATES DISTRICT JUDGE
NOVEMBER 12TH, 2014
JACKSON, MISSISSIPPI

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1 (COURT CALLED TO ORDER)

2 THE COURT: You may be seated.

3 THE COURTROOM DEPUTY: Before the court this morning
4 is Campaign for Southern Equality, et al. v. Phil Bryant,
5 et al, civil action number 3:14cv818CWR-LRA.

6 THE COURT: Good morning.

7 (ALL RESPONDED "GOOD MORNING")

8 THE COURT: Welcome to the Southern District of
9 Mississippi. It's nice to have a full courtroom. Are we ready
10 to proceed?

11 MR. McDUFF: We are, your Honor.

12 THE COURT: All right. I'll have you introduce
13 yourselves to the court, I guess, to make sure I know everybody
14 who's here.

15 MR. McDUFF: Good morning, your Honor. Robert McDuff
16 of Jackson, along with Roberta Kaplan and Joshua Kaye from
17 Paul, Weiss firm in New York, Sibyl Byrd from my firm, Dianne
18 Ellis from Ocean Springs, and Diane Walton from Asheville,
19 North Carolina, for the plaintiffs.

20 THE COURT: All right.

21 (PAUSE)

22 MR. MATHENY: Your Honor, Justin Matheny and Paul
23 Barnes with the Mississippi Attorney General's Office for the
24 State defendants.

25 THE COURT: Okay.

1 MR. TEEUWISSEN: Good morning, your Honor. Pieter
2 Teeuwissen, board attorney for Hinds County Board of
3 Supervisors representing Barbara Dunn. Also with me is Anthony
4 Simon, special counsel to the legal counsel for the board.

5 THE COURT: All right. Ms. Kaplan, are you ready to
6 proceed?

7 MS. KAPLAN: Yes, your Honor.

8 (COURT REPORTER EQUIPMENT MALFUNCTION)

9 (RECESS)

10 THE COURT: You may be seated. I've been told that
11 it's at least working right now. So I won't ask you to speak
12 real fast. So we may -- you can begin, Ms. Kaplan.

13 MS. KAPLAN: Good morning, your Honor. May it please
14 the court. It's good to be down here in Mississippi. I was
15 going to start by explaining that I actually grew up -- I was
16 born and raised in Cleveland, Ohio, but everyone thinks that I
17 was born and raised in New York because I have a tendency to
18 speak very, very fast, which may be a good thing today,
19 although, typically, it's not a good thing.

20 THE COURT: No, it's never a good thing for our court
21 reporter. So --

22 MS. KAPLAN: Exactly. So if I'm -- if for any
23 reason -- I'm going to try to go very slow; but if for any
24 reason I'm going too fast and you can't follow me, please let
25 me know and I'll slow it down.

1 We are here this morning because every single day my
2 clients and gay couples like them throughout the state are
3 suffering harm solely because they are gay. Indeed, solely
4 because they are gay, they are being deprived of all the many
5 rights, benefits, protections and responsibilities that come
6 with marriage under Mississippi law.

7 My clients Becky Bickett and Andrea Sanders, Joce
8 Pritchett and Carla Webb are all here today with their
9 families. All they want is to be treated like everyone else.
10 What they want for themselves and their children is a right
11 that most people take for granted. By treating straight
12 families one way and gay families another way as if they were
13 inferior or second class, the State of Mississippi
14 discriminates against gay people and their families; and the
15 consequences of that discrimination are profound.

16 For example, if, God forbid, one of my clients were to
17 get critically sick tomorrow, it is not at all clear that her
18 spouse or partner would be able to visit her in the hospital or
19 to make important medical decisions about her treatment if she
20 is unable to do so. When it comes time for my clients to pay
21 their taxes, they have to go to the trouble and expense of
22 preparing two sets of returns. And they cannot get, of course,
23 the tax deductions that are available to straight married
24 couples in Mississippi.

25 And perhaps most obviously and most importantly, Becky

1 and Andrea's 15-month-old twin boys and Joce and Carla's
2 children, a six-year-old girl and a two-year-old boy, do not
3 have two legal parents who are married under the laws of the
4 state in which they live. That's important because of the many
5 concrete rights and benefits that children enjoy when their
6 parents are married.

7 But it's also important in another sense, namely, in
8 the sense that the dignity and self-worth of these kids is
9 demeaned or, in the words of Justice Kennedy, humiliated daily
10 by having to grow up in a state that tells them through its
11 laws that their family is inferior. To use a fancy legal
12 phrase from New York City, that's just plain wrong.

13 Because the parties agree that the most important
14 issue before the court is likelihood of success on the merits
15 and because the other issues will be discussed in connection
16 with the State's motion -- contingent motion for a stay, I'd
17 like to focus my arguments on the merits or likelihood of
18 success. I want to start with *Baker v. Nelson*.

19 THE COURT: Well, let's start with another principle
20 first. You mentioned your clients, the individuals. What
21 about the Campaign for Southern Equality? I just want to make
22 sure, that is a party as well. Right?

23 MS. KAPLAN: Absolutely, your Honor. Campaign for
24 Southern Equality -- I apologize.

25 THE COURT: No, no.

1 MS. KAPLAN: Campaign for Southern Equality is an
2 organization in Mississippi that represents gay couples
3 throughout Mississippi, all of whom want to share -- who have
4 the same interests that the individual plaintiffs do here.
5 Want to get married, want to have the rights and benefits under
6 Mississippi law.

7 THE COURT: Now, are the children parties to this
8 action?

9 MS. KAPLAN: They're not, your Honor.

10 THE COURT: The children are not.

11 MS. KAPLAN: In fact, they're back with their
12 babysitter today.

13 THE COURT: So how does Southern Equality -- Campaign
14 for Southern Equality, how can they bring this action?

15 MS. KAPLAN: Well, the laws on institutional
16 standing -- the case on institutional standing in certain
17 causes of actions have gone both ways, where if you look at the
18 precedents, the post-Windsor precedents, some of the courts
19 have upheld institutional standing for groups like the
20 Campaign; some have not.

21 We believe that here the Campaign, since it's a group
22 that clearly represents gay couples in Mississippi who want
23 exactly the same thing as individual plaintiffs, they are an
24 appropriate plaintiff under the institutional standing rules.
25 And, in fact, the State hasn't contested that.

1 THE COURT: I understand. Okay. So *Baker v. Nelson*.

2 MS. KAPLAN: So *Baker v. Nelson*. So for the reasons
3 stated in our reply brief, *Baker v. Nelson*, a one-sentence
4 unsigned opinion from 42 years ago, does not apply. The
5 Supreme Court has made it very clear -- one thing we can all
6 agree is that the Supreme Court has made it very clear that
7 summary dispositions are not binding when doctrinal
8 developments indicate otherwise, subsequent doctrinal
9 developments. Here there's been a sea change both in the
10 doctrine and in reality. And let me explain the latter first.

11 In 1972 when *Baker v. Nelson* was decided almost
12 everyone who was gay, with the obvious exception of the *Baker*
13 couple, but almost everyone who was gay was in the closet. My
14 client Edie Windsor was completely in the closet in 1972.
15 Obviously, today, given the people here and my clients, the
16 world is totally different. So not only were there legal -- a
17 sea change in legal developments, which I'll explain now, but
18 there was an incredible sea change in the world for gay people
19 in a way that has to be I think taken into account when
20 considering *Baker*.

21 Now, in terms of the doctrinal developments, they're
22 pretty clear. When *Baker* was decided in 1972, sex was not a
23 suspect or a quasi-suspect classification. *Baker* was actually
24 a case brought solely on grounds of sex discrimination. They
25 didn't even have any conception at that time to bring a case

1 based on discrimination based on sexual orientation.

2 Two, the Supreme Court had not yet decided that a
3 classification of gay people undertaken for its own sake, which
4 was the issue in *Romer*, lacked a rational basis. Three, the
5 Supreme Court had not yet decided -- and this is something we
6 will talk about later in other context -- that persons in a
7 homosexual relationship may seek autonomy for these purposes
8 just as heterosexual persons do, in other words, that laws that
9 criminalize being gay, criminalize gay relationships were
10 unconstitutional. That's *Lawrence v. Texas*, 2003.

11 And, of course, finally, in 1972 the Supreme Court had
12 not yet decided as they did a year ago that treating gay
13 couples' marriages differently from straight couples demean the
14 couple whose moral and sexual choices the Constitution
15 protects. That's *United States v. Windsor*.

16 Defendants attempt at page five of their brief to cite
17 *Baker* based on the reasoning of the Minnesota Supreme Court is
18 actually improper. Another thing that is very clear about
19 summary dispositions is they cannot be cited for the reasoning
20 of the court below. And, in addition, the equal protection
21 holding of the Minnesota Supreme Court on sexual discrimination
22 grounds has been totally superseded by the law that I just
23 cited.

24 THE COURT: But hasn't the Supreme Court had the
25 opportunity now with all of these cases coming before it,

1 assuming that each of these cases has raised *Baker* in some
2 context -- I know the dissents have argued it and I know that
3 other people have argued it. Doesn't the Supreme Court have an
4 obligation to step in and say that either *Baker* is a
5 precedential value or not?

6 MS. KAPLAN: Well, two things on that, your Honor.
7 First of all, in *Windsor*, which is the court they did decide --
8 the case they did decide, *Baker v. Nelson* was raised, of
9 course, as a defense. It was analyzed by Chief Judge Dennis
10 Jacobs in the Second Circuit in his opinion, and that opinion
11 was then affirmed by the Supreme Court. And there's no mention
12 whatsoever in the Supreme Court's decision that they were in
13 any way troubled by *Baker*. So if they -- presumably, if they
14 had been troubled by *Baker*, if that was an issue, they would
15 have mentioned it in *Windsor*.

16 Moreover, at the oral argument of the *Perry* case --
17 that was the Proposition 8 case that happened the day before.
18 So it's March 26, 2013 -- Justice Ginsburg, at least, in her
19 questioning of Chuck Cooper made it very, very clear that in
20 her view *Baker* has been totally superseded by subsequent
21 doctrinal developments.

22 THE COURT: But she could have written a concurring
23 opinion saying that. Right?

24 MS. KAPLAN: She could have. They also could have
25 written an opinion about heightened scrutiny and they didn't do

1 that.

2 THE COURT: Okay.

3 MS. KAPLAN: And although I agree with the State you
4 have to be very careful about citing denial of cert, the
5 Supreme Court's decision to deny cert, I do have to mention the
6 fact that the recent denial of cert in the cases that came up
7 from the Fourth, the Seventh and the Tenth Circuits were all
8 decisions in which *Baker* again had been raised and again had
9 been cited by the Circuits as no longer binding. So, again,
10 perhaps -- I can't say that they made a decision; but perhaps
11 if they were incredibly troubled by that, they might have taken
12 cert in one of those cases.

13 As for the two opinions that are cited by the State --
14 actually, it's only one case. It's two opinions, but one's the
15 magistrate judge and one's the district court affirming. It
16 was a pro se case brought by a gay prisoner. First he argued
17 that the Mississippi sodomy law was unconstitutional. Then he
18 argued that there should be a right to marry -- for gay people
19 to marry in Mississippi. He lost both of those arguments.

20 But I don't think that there can be any dispute that
21 the way that those cases were litigated as a pro se prisoner
22 and the issues that were raised are very, very different not
23 only than the circumstances here but the circumstances in
24 *Baker*, and they're really -- they're not binding on your Honor,
25 in any event, but I don't even think they're persuasive

1 authority.

2 THE COURT: And that prisoner even asked the court to
3 appoint him a lawyer. Right?

4 MS. KAPLAN: Yes, and it was denied.

5 THE COURT: It was denied. Yeah.

6 MS. KAPLAN: Finally, the State's argument that
7 *Windsor* and *Baker* are somehow consistent with each other really
8 makes no sense to me at least. The Supreme Court stated over
9 and over again, as we said in our moving brief in *Windsor*, that
10 state limitations on the right to marry must still comply with
11 the United States Constitution.

12 What *Windsor* does is affirm the equal dignity of gay
13 people. *Baker* by not even considering the issue a substantial
14 federal question in 1972 does exactly the opposite.

15 If it's okay with your Honor, I'm going to move on. I
16 don't know if you have any other questions about *Baker*, but I'm
17 going to move on to heightened scrutiny.

18 THE COURT: Okay.

19 MS. KAPLAN: So what we believe, as we set forth in
20 our moving brief -- and I apologize. Let me correct myself.
21 The cases that we just talked about were actually not in our
22 reply brief, a number of them.

23 THE COURT: I understand.

24 MS. KAPLAN: I apologize. As we set forth in our
25 moving brief, however, we believe that heightened scrutiny

1 applies here for at least two independent reasons. First and
2 arguably most importantly, we believe that laws that
3 discriminate against gay people as these laws do must be
4 scrutinized more closely by the courts.

5 The standard law on this is that the court should look
6 at four factors: One, whether there's been a history of
7 discrimination against the group; two, whether being a member
8 of the group has anything to do with the person's ability to
9 contribute or participate in society; three, whether that
10 someone who was a member of the group either whether they can
11 change or should have to change, as Dennis Jacobs put it in the
12 Second Circuit, in order to not to be subject to
13 discrimination; and, four, whether the group has so much
14 political power that they don't need the courts. They can get
15 anything they want done in the legislature.

16 Now, I'll note and I will talk about this later that
17 the State does not engage with us on any of these four factors.
18 I'm going to go through them very briefly now because I
19 think -- to quote my eight-year-old son, Jacob, I think the
20 answer to almost all of them is "doi."

21 For history of discrimination, again, I don't think
22 there's ever any serious dispute. Even the House Republicans
23 in *Windsor* did not dispute that there's been a horrible history
24 of discrimination against gay people in this country.

25 Two --

1 THE COURT: What about in Mississippi?

2 MS. KAPLAN: As well as in Mississippi, your Honor.

3 THE COURT: What evidence do we have?

4 MS. KAPLAN: Well, we have the law that we're -- the
5 laws that are currently at issue here. We have the fact that
6 gay people cannot adopt together. That's one of the issues
7 that would, hopefully, be resolved by this case. We have the
8 articles that we cite for the legislative history of the two
9 statutes where legislators are saying things that are really --
10 I don't think people would say about most other minority groups
11 today. So there's no question that that history of
12 discrimination exists and, frankly, it continues.

13 THE COURT: And with respect to -- since you did
14 mention what the legislators have said, how much value should
15 the court put into specific statements from specific
16 legislators who might vote -- should the court treat the
17 statute any different from the constitutional referendum -- we
18 may get to that later --

19 MS. KAPLAN: Right.

20 THE COURT: -- but should it treat it any
21 differently --

22 MS. KAPLAN: Yeah. They should -- the next question
23 there is whether you can consider statements of legislators for
24 determining whether a statute was motivated by improper animus
25 in the context of *Romer* and *Windsor*, and I believe you can.

1 First of all, as I understand it, there is no
2 legislative history for these statutes. So we have to rely on
3 something. And what we rely on are the statements of the
4 governor himself who signed it and legislators themselves who
5 voted for it. So it's pretty -- it's as close as you can get
6 to legislative history, particularly when none exists.

7 But, most importantly, if you look at what Justice
8 Kennedy did and find the impermissible animus in DOMA, he
9 relied only on two things. First, he relied on the wording,
10 the name of the statute itself, the so-called Defense of
11 Marriage Act. He said the fact that it was called the Defense
12 of Marriage Act showed that there was improper animus. And,
13 two, he relied on one sentence in the House report that said
14 that it was being passed based on moral disapproval of
15 homosexuality. That's all he needed in *Windsor* to make that
16 conclusion.

17 So I don't think -- and he did nothing in *Windsor*
18 about trying to get into the minds of the President, who signed
19 the bill, or the members of Congress who voted for it. So,
20 clearly, for this perspective -- and I'm not saying in any
21 other perspective, but it's clearly in terms of determining
22 animus against gay people, which has now kind of formed its own
23 jurisprudence under constitutional law, clearly, that is
24 enough. And I think the record here is overwhelming.

25 THE COURT: Okay.

1 MS. KAPLAN: So I did the history of discrimination.
2 The second factor is is there anything about being gay that has
3 anything to do with one's ability to contribute to society.
4 Again quoting my son, "doi". I don't think anyone would argue
5 that being gay has anything to do with anyone's ability to be a
6 doctor, to be a dentist, like one of my clients, to be an
7 engineer, like another of my clients, to be a lawyer -- there
8 are gay federal judges -- to be a judge. Clearly, that
9 question -- that factor is satisfied.

10 Third, should you have to --

11 THE COURT: What about to be a parent?

12 MS. KAPLAN: Or to be a parent, your Honor. We can
13 talk about that in depth, but, yes, to be -- and I -- and
14 surely to be a parent. The evidence on being a parent shows --
15 and the -- and you can look at the district court's decision in
16 Michigan, which was overruled, but not on this issue. It
17 was -- Judge Sutton said nothing about this issue in his
18 opinion.

19 The court went through all the evidence. There was
20 live testimony. And the court concluded that all the
21 overwhelming weight of I would say even the -- not overwhelming
22 weight. All the scientific evidence that has been amassed over
23 the last 30 years suggests that gay parents function just as
24 well as straight parents in terms of raising kids. The two
25 experts that the State of Michigan had proposed he said were

1 incredible and not worthy of serious consideration.

2 And, in fact, the -- I have to admit this. The
3 evidence actually shows that there's some evidence that
4 suggests that lesbian moms are actually a little better than
5 straight parents in terms of scientific outcomes, but I don't
6 think your Honor needs to make any findings on that.

7 The next factor for heightened scrutiny is whether you
8 should have to change being gay. Again, I think that's pretty
9 obvious. I don't think people can change being gay. Again,
10 the scientific evidence is very strong.

11 Perhaps the best evidence of that is the evidence of
12 my client Edie Windsor in the *Windsor* case who shortly after
13 graduating college in the early 1950's actually got married to
14 a guy. That's how she gets the name Windsor. And shortly
15 after her marriage, she told her husband that she couldn't
16 really love him the way he deserved to be loved and that he
17 deserved something else and so did she. She essentially came
18 out to him in the early '50s. And the other side in *Windsor*
19 tried to show that that marriage was somehow evidence that Edie
20 could change.

21 The fact of the matter is that Edie Windsor's marriage
22 shows that she couldn't change. If she could change who she
23 was, she'd still be married to that guy in Philadelphia living
24 in Philadelphia today. The fact is that gay people can't
25 change who they are. And even if they could, they shouldn't

1 have to change who they are in order not to be discriminated
2 against.

3 And the final factor is political power. Again, I
4 think the crucial issue here is to compare gay people to the
5 other groups that get heightened scrutiny, women most notably.
6 At the time the Supreme Court decided *Frontiero* -- in *Frontiero*
7 that women would get heightened scrutiny, women had far more
8 political power than gay people do today. They still have far
9 more political power than gay people today. They are, after
10 all, the majority of the electorate.

11 And that didn't stop the Supreme Court from deciding
12 that women should get heightened scrutiny. So it shouldn't
13 stop any court from concluding the same with respect to gay
14 people. And, again, Dennis Jacobs in the Second Circuit
15 reached that conclusion, as well as the Ninth Circuit.

16 THE COURT: What about the argument that because of
17 how -- I think Judge Posner mentions that things have happened
18 over the last 10 or 11 years that sort of suggest that they at
19 least have power in the legal sense because the landscape has
20 changed dramatically, even in the last two to three years.

21 So how can you say they don't have power to change
22 when, in fact, civil rights, African Americans, you know, went
23 through the Reconstruction, went through Jim Crow, and 1965
24 Civil Rights Act -- '64 Civil Rights Act, '65 Voting Rights
25 Act, still a question of whether it's necessary still, whether

1 they have risen to the power that they've had at least since
2 Reconstruction, but this -- the gay rights movement, if you
3 will, has moved ahead light years at a pace much greater than
4 women, many greater than African Americans?

5 MS. KAPLAN: I agree with you about that, your Honor.
6 I mean, the truth of the matter is I can't deny that, that
7 gay -- that gay civil rights movement has moved faster probably
8 than any other civil rights movement in U.S. history. And that
9 is true.

10 I would respond to what you're saying by really three
11 things. First of all, the Supreme Court has said that of those
12 four factors, by far the most two important are history of
13 discrimination and ability to contribute to society. And we
14 clearly meet those.

15 Two, if you think about heightened scrutiny kind of as
16 a whole, what courts are really looking at is whether
17 legislatures should be in the business of passing laws that
18 treat that group differently. All right. And the courts have
19 concluded, as they should, that legislatures should not be in
20 the business of treat -- of passing laws that treat African
21 Americans differently; they should not be in the law -- in the
22 business of passing laws that treat women differently, with
23 very limited exceptions. And I think the same thing is true
24 for gay people.

25 With respect to Judge Posner, his opinion on this,

1 which is very interesting, he and a lot of legal theorists have
2 the view that this framework, which is old framework for
3 heightened scrutiny, should no longer be the legal framework.
4 The fact of the matter is the Supreme Court has not overruled
5 that framework. It is still the law.

6 It may be that no other group ever enters this group,
7 but it seems to me that gay people are so close, with obvious
8 exceptions, are close enough in kind of how it feels to the way
9 women have been treated under the law, the way African
10 Americans, unfortunately, were treated under the law, that they
11 surely should fit within this rubric. And, again, that's what
12 Dennis Jacobs, a very conservative judge -- I think DOMA was
13 the first statute he ever held was unconstitutional. That's
14 what he concluded in the Second Circuit.

15 Now, let me talk about this *Baker v. Wade* issue. And
16 I actually -- I'm lucky that we're here in Mississippi
17 resolving this issue because the situation in the Fifth Circuit
18 actually is very different on this than any other circuit. And
19 the reason that is is that *Baker v. Wade* was a case challenging
20 the Texas sodomy law that criminalized the gay people --
21 intimacy between gay people.

22 It was actually the same statute that was then -- that
23 was at issue in the *Bowers* case a year later, actually, in
24 1986, and then overruled by the Supreme Court in the *Lawrence*
25 case. So unlike the other Circuits, the Sixth Circuit most

1 recently where they say that they have precedent on the books
2 that binds them, prior precedent on this heightened scrutiny
3 point, here the only the precedent -- the precedent on the
4 books is a case upholding the very statute that the Supreme
5 Court overruled could not be clearer in *Lawrence*. And, in
6 fact, the Supreme Court said in *Lawrence*, quite unusually, that
7 *Bowers* was wrong today when they decided *Lawrence* and wrong
8 when it was decided.

9 And every one of the subsequent -- I have --
10 unfortunately have to get back to the pro se prisoner area, but
11 every one of the subsequent cases to *Wade* cited pro se prisoner
12 cases raising issues about treatment of prisoners, which are
13 understandably important issues, but not fully raising the
14 issues in which the court is just saying that *We don't give*
15 *heightened scrutiny to gay people, Baker v. Wade*.

16 I don't see, given my understanding of the law, how
17 *Baker v. Wade* can still be good law today. It just makes no
18 sense to me. It's the exact same statute in *Bowers* and
19 *Lawrence*.

20 THE COURT: But is this court required to follow Fifth
21 Circuit precedent even though it may be wrong?

22 MS. KAPLAN: I don't think it's wrong. I think it's
23 been overruled. I don't think -- yes, if the Supreme Court --
24 this court is required to follow Fifth Circuit precedent even
25 if it's wrong. And that was the situation -- that would be the

1 situation for a district court, arguably, in the Sixth Circuit.

2 But this is an unusual situation because here the

3 precedent -- I don't think anyone reasonably can consider it to

4 be good law. It's the same case that the Supreme Court said

5 that *Lawrence* overruled when they overruled *Bowers*. So I

6 don't -- maybe I'm missing something, but I don't think it's

7 good law. I think you have to follow law you may disagree

8 with, but I don't think you have to follow a decision of the

9 circuit court that has been overruled.

10 THE COURT: And the circuit has not spoken at all in

11 the -- on any other issue with respect to scrutiny that is to

12 be applied in the --

13 MS. KAPLAN: All -- all it has done is -- subsequent

14 to *Wade*, there are three or four prisoner cases cited by the

15 State in which it says, essentially as an aside, you know,

16 *We're not giving heightened scrutiny to gay people, Baker v.*

17 *Wade*. That's the state of the law. They never -- there's no

18 case in which they analyze the issue post *Lawrence* or post --

19 even post *Romer* and actually analyze it and look at the issues

20 and conclude as a matter of reasoned authority since *Baker* that

21 gay people shouldn't get heightened scrutiny.

22 Now, the State is correct that the Supreme Court

23 itself has never decided that heightened scrutiny applies to

24 laws that discriminate against gay people. But, importantly,

25 the Supreme Court has never decided that it does not either.

1 And if you look at the cases of *Romer*, *Lawrence* and *Windsor*,
2 the Supreme Court made it very clear that it didn't need to
3 decide that question because the court was deciding the case on
4 independent alternative grounds. In *Romer* and *Windsor*, that
5 the laws did not even satisfy the lowest form of review of
6 rational basis, and *Lawrence* was a due process case.

7 Now, the other ground for heightened scrutiny is that
8 laws that prevent a class of people from exercising a
9 fundamental right, here the right to marry, are also subject to
10 a higher form of scrutiny. And here, of course, I actually
11 agree with the State about this. The issue is really how you
12 frame the question.

13 The State would argue that there's only a fundamental
14 right to marry a person of the opposite sex. We contend that
15 the fundamental right to marry involves precisely the kinds of
16 personal autonomy discussed in *Lawrence*, which, again, was a
17 due process case, where the Supreme Court explained that when
18 sexuality finds overt expression in intimate conduct with
19 another person, that conduct can be but one element in a
20 personal bond that is most enduring. The liberty protected by
21 the Constitution allows homosexual persons to make -- the right
22 to make that choice. "A personal bond that is more enduring,"
23 that sounds to me like what our courts are talking about when
24 they're talking about marriage.

25 And on top of that, with all due respect, the Supreme

1 Court has said that prisoners serving long terms in prison and
2 deadbeat dads have the right to marry. What I mean by deadbeat
3 dads is fathers who won't pay child support. If those groups
4 of people have the right to marry, my clients who are
5 law-abiding citizens should have that right too.

6 Now, when heightened scrutiny applies, a court must
7 determine whether the unequal treatment has an exceedingly
8 persuasive justification. And the court can only look at
9 genuine rationales that were actually stated at the time. It
10 can't come up with post hoc rationalizations. It can't
11 speculate.

12 THE COURT: Well, let's go back to what *Windsor* said
13 about it, if anything. *Windsor* made the distinction that -- it
14 sort of disclaimed any intent to get into what other states --
15 what states might have been doing. *Windsor* was about what
16 New York had done in expanding the rights and the federal
17 government coming in to pass DOMA and sort of restricting that
18 right.

19 But the decision in *Windsor* says, *But we're not going*
20 *to -- I think -- I mean, my reading of it says that We're --*
21 *We're not going to make any attempt at this point to resolve*
22 *what other states might be doing with respect to either*
23 *expanding the rights or restricting the rights.* That's one
24 question.

25 Obviously, states interfere with the right to marry

1 all the time. They prescribe who you can't marry.
2 For example, in the state of Mississippi I think they say your
3 first cousin, your stepmother, step -- you could probably marry
4 your in-law, I don't know, but your stepparents, your -- what's
5 the difference if the state can come in and say you can't marry
6 a relative and you can't marry certain other individuals? If
7 it -- doesn't the state have that right?

8 MS. KAPLAN: Yeah. The state clearly has the right --
9 by the way, in New York, your Honor, first cousins can get
10 married, just in case you were interested.

11 THE COURT: That's New York.

12 MS. KAPLAN: Exactly. But, of course, the states have
13 the right. They have the police power right -- and this is
14 where the federalism thing comes in -- to set limitations on
15 marriage. And those limitations can be based on age, based on
16 consanguinity, et cetera. The limitation that exists is that
17 whatever limitations the states set have to comply with the
18 Constitution. That's a pretty easy test to follow.
19 Limitations based on marrying your first cousin or marrying an
20 uncle or age of consent, obviously, are all going to pass the
21 Constitution.

22 THE COURT: And what about multiple -- I think in Utah
23 people at one time at least --

24 MS. KAPLAN: Yes.

25 THE COURT: -- polygamy.

1 MS. KAPLAN: Two answers to that. So, first of all,
2 polygamy, I'm not aware -- you know, in this situation we're
3 talking about discrimination based on sexual orientation. In
4 polygamy you're talking maybe about discrimination based on
5 people who want to -- on marriage -- the number of people who
6 are getting marriage. People in polygamist relations clearly
7 can marry one person; they just can't marry 20 people. And so,
8 clearly, I think that would satisfy -- it certainly would
9 satisfy equal protection standards.

10 Under due process standards, which is a higher
11 level -- first of all, let me again say two things. First of
12 all, since I've been litigating these issues now for a very
13 long time, people have made this argument to suggest that
14 there's going to be this huge groundswell of litigation about
15 polygamy if we win. And it's never happened and it, frankly,
16 never will happen.

17 But even if it were to happen, your Honor, it's my
18 understanding -- and I'm no expert on this -- that there has
19 been sufficient evidence adduced that women and children in
20 polygamist marriages -- and, typically, polygamist marriages
21 are multiple wives, of course -- suffer. And for that reason I
22 think a legislature could easily conclude and could satisfy the
23 heightened scrutiny standards that those laws were
24 constitutional.

25 No one's making any argument here that the women --

1 the lesbians or the gay men in gay relationships suffer.

2 Indeed, they concede to the contrary and the same for their
3 children.

4 The other night -- I was actually thinking about this.
5 And last night I actually went back and I reread *Loving*. And
6 there's a couple of sentences which if you don't mind, your
7 Honor, I'd like to read to you. They really stuck out to me
8 because they really go directly to this question.

9 *Loving*, of course, was litigated in 1967. And here is
10 what the Supreme Court said: "While the state court is no
11 doubt correct in asserting that marriage is a social relation
12 subject to the State's police power" -- exactly what we were
13 just talking about -- "the State does not contend in its
14 argument before this court that its powers to regulate marriage
15 are unlimited notwithstanding the commands of the Fourteenth
16 Amendment. Nor could it do so, in light of *Meyer v. State*" --
17 "*Meyer v. Nebraska* and *Skinner v. Oklahoma*."

18 So what's incredibly amazing actually about this
19 passage is that in 1967 the states were -- how should I put
20 it? -- more limited in the arguments they were making about
21 federalism than they are today; but the Supreme Court made it
22 clear that even if they had made the argument that the State of
23 Mississippi is making today, that it has unlimited or exclusive
24 authority to regulate marriage, they couldn't make that
25 argument. That's what the Supreme Court said in *Loving* in

1 1967.

2 THE COURT: But with respect to *Loving* and the
3 Fourteenth Amendment and the *Meyer* case, *Skinner* case, the
4 undercurrent in each of those cases, though, is -- the fact of
5 the matter is is that certainly in 18 -- whenever the
6 Fourteenth Amendment was passed, the conception -- and I think
7 that the *Meyer v. Nebraska* case is one from 1880-something --
8 the conception of same-sex marriage wasn't thought about,
9 conceptualized in anything about liberty or anything else. I
10 mean, do you disagree with that statement?

11 MS. KAPLAN: No question, your Honor. No question
12 that the drafters of the Fourteenth Amendment had no concept
13 that probably either -- either that gay people existed or that
14 gay people could get married. I don't dispute that at all.
15 And I want to be very careful about this because I think the
16 distinctions are important.

17 I'm not arguing -- we are not arguing in any way that
18 the discrimination suffered by gay people is in any way
19 equivalent to the discrimination suffered by African Americans.
20 There has been violence against gay people, clearly, but it
21 doesn't arise even close to the levels of the violence that
22 existed in the South, sadly, many years ago against gay (sic)
23 people.

24 THE COURT: But the State's argument is, in fact, that
25 in all these cases that talk about marriage and how it is a

1 right that is just broader than any other right and, you know,
2 the honor, the privilege of getting married and --

3 MS. KAPLAN: Right.

4 THE COURT: -- raising children and all of that --

5 MS. KAPLAN: Right.

6 THE COURT: -- that in the -- only until *Romer*
7 possibly did you even think in the concept of same-sex
8 marriage.

9 MS. KAPLAN: Yes. But let me go to that, because it's
10 the same point. Again, I don't think the distinctions are the
11 same. Thurgood Marshall when he litigated these cases as a
12 young man was literally worried every day he was going to get
13 killed. I'm not aware of any attorney litigating any civil
14 rights case who has faced anything like that.

15 However, this is where the analogy I think is
16 appropriate, because one thing that we know is clear is that
17 the drafters of the Fourteenth Amendment totally had no concept
18 that there would be desegregation in public facilities, in
19 schools, that white people in *Loving* would be able to marry
20 black people.

21 And so the Supreme Court has made it very clear since,
22 particularly on the Fourteenth Amendment -- I think the
23 argument for originalist interpretation of the Fourteenth
24 Amendment is weaker than for an originalist interpretation of
25 the Second Amendment because the whole point of the Fourteenth

1 Amendment was to make it clear that when the people -- when
2 this country started the Constitution, its conception of race
3 in American and of equality in American was wrong. And even
4 that conception has changed in time since the drafting of the
5 Fourteenth Amendment.

6 So, again, I understand -- I don't concede -- I
7 concede freely that the drafters of the Fourteenth Amendment
8 had no conception of gay marriage. I'll concede that in 1967
9 when they passed *Loving* -- I was a year old -- they had no
10 conception of gay marriage. But that doesn't change the law.
11 It doesn't change the commandments of equal protection and due
12 process. And it's consistent with the court's precedent on
13 equal protection and due process under the Fourteenth
14 Amendment.

15 So the standard -- if it's either a fundamental right
16 or if there's heightened scrutiny for sexual orientation or --
17 I'm not going to argue this today -- heightened scrutiny for
18 gender discrimination, the standard that the court looks at is
19 whether the unequal treatment has an exceedingly persuasive
20 justification.

21 As I said before, the State doesn't even attempt to
22 meet that standard. None of the -- very few of the parties in
23 any of these cases have attempted to meet that standard. They
24 didn't attempted to do it in *Windsor* either. And that's
25 clearly because they cannot. Again, as I'm about to go on, I

1 don't even think they can meet rational basis. So let me turn
2 now to rational basis.

3 While the State cites the *Beach Communications* case
4 for its articulation of an extremely deferential standard of
5 review, in the context -- and this is what I was referring to
6 earlier -- in the context of laws that discriminate against gay
7 people, several things are clear. First, if a law is
8 motivated, either in whole or in part, by either moral
9 disapproval or by a fear or dislike of people who appear to be
10 different, then at a minimum the law requires more careful
11 consideration. We cited in our moving brief Justice Kagan in
12 argument in *Windsor* when she said it "sends up a pretty good
13 red flag." I think it's the same point.

14 As I said before, the court doesn't have to get in --
15 in this particular context, it's clear from the Supreme Court
16 precedents that the -- a judge does not have to get into the
17 hearts or minds of the legislators. It can look simply at
18 statements that were made. And I referred to earlier on DOMA
19 it was enough that it was called the Defense of Marriage Act
20 and the single statement from the House report.

21 Here, as we talked about, while there is no
22 legislative history for this law or any laws as I understand at
23 that point in time, that can't mean that the court can't
24 consider whether or not there was impermissible animus in this
25 context. And here there's more than sufficient evidence

1 because the evidence that we cited were actually statements
2 made by the legislators.

3 So we cited in our brief a statement from the governor
4 at the time saying, "Same-sex relationships are perverse," that
5 "For too long in this freedom-loving land cultural subversives
6 have engaged in trench warfare on traditional family values."
7 The senate judiciary chairman at the time was talking about the
8 law and saying there's more symbolism than substance to it. If
9 a law has more symbolism than substance, then clearly -- it
10 clearly was a law being cast based on this kind of animus.

11 THE COURT: Is it important to look at the chronology
12 of when all these -- when the legislation came and when the
13 constitutional amendment process was begun? I presume it was
14 after the Hawaii and Massachusetts case and may have been after
15 Congress passed DOMA.

16 MS. KAPLAN: Yes.

17 THE COURT: So if it was after Congress passed DOMA,
18 could we look at the DOMA debate and what might have been going
19 on when enacting that to sort of transpose to what might have
20 been going on here in Mississippi and other states passing the
21 mini DOMAs?

22 MS. KAPLAN: Absolutely, your Honor. In fact, the two
23 laws here are precisely -- you can figure it out very easily.
24 So 1997 the statute was passed, clearly at the same time as
25 DOMA -- DOMA was 1996 -- and was based, of course, on kind of

1 this fear out of the Hawaii Supreme Court decision that was
2 since vacated that gay people are going to go to Hawaii and
3 then go through all the rest of the country and kind of invade
4 other states. You kind of hear that in the statements.

5 And the constitutional amendment was from 2003, as I
6 recall -- do I have the year right? I believe that year is
7 right -- which, again, is right after the first case that came
8 down in Massachusetts, the *Goodridge* case, allowing gay people
9 to marry. So there's no question what was motivating both of
10 these statutory provisions at issue. And I think it's totally
11 appropriate for the court to look at that.

12 THE COURT: Now, with respect to DOMA itself,
13 though --

14 MS. KAPLAN: Sure.

15 THE COURT: -- the landscape changed by the time DOMA
16 got to the Second Circuit or the Supreme Court. By that time,
17 the president who signed it disavowed it.

18 MS. KAPLAN: Sure.

19 THE COURT: The president who was authorized to
20 enforce it said he wasn't going to enforce it. The
21 representative who sponsored the legislation disavowed it. And
22 everybody -- well, not everybody, but a lot of people in
23 Congress who pass -- who voted on the law said now times have
24 changed and it's wrong.

25 MS. KAPLAN: Yes.

1 THE COURT: Do we have that situation here in
2 Mississippi where people are in leadership positions disavowing
3 either their statements, their votes or the law or the
4 constitutional provision?

5 MS. KAPLAN: Let me say two things. So, first of all,
6 in DOMA, you're absolutely right. In fact, President Clinton
7 wrote an op-ed -- I think it was two or three weeks --
8 President Clinton signed DOMA about two or three weeks before
9 the argument in which he said, essentially, that the law was
10 passed based on exactly this kind of impermissible animus.

11 Let me clear -- be clear about this for a second.
12 Impermissible animus in this context does not mean that
13 someone's a homophobe. You don't have to be a homophobe or a
14 bigot to have the kind of animus that the court has found.
15 Again, in DOMA, just saying that the law was called Defense of
16 Marriage and it passed by moral disapproval was enough.

17 And what President Clinton said in his op-ed is that
18 when he signed DOMA, he did it based on a misunderstanding of
19 who gay people were and what their relationships were. And
20 that's why he has now come to realize that the decision was
21 wrong.

22 Now, of course, I think what your Honor is suggesting,
23 there were arguments made at the time of *Windsor* -- and if you
24 look at the oral argument, you hear this in the questioning by
25 the chief justice -- that the fact that times have changed --

1 and there clearly has been a sea change with respect to gay
2 people -- should be enough, that the court shouldn't have to
3 intervene because everything will just get done in the
4 legislative process.

5 Well, I'm no expert on the legislative process in
6 Mississippi, but I can tell you that at least with respect to
7 Congress, in which I assume there's probably greater support
8 for a repeal of DOMA bill than there would be repealing any of
9 these laws in Mississippi, that was not enough to stop the
10 Supreme Court from deciding that DOMA was unconstitutional.

11 So that's the best I can offer. I doubt that the
12 prospects are -- in Mississippi are very high. But even if
13 they were as good as they were in Congress with DOMA, that
14 would not be enough.

15 The other thing -- the other way that courts look at
16 this, the second factor that courts look at, again, with laws
17 discriminating against gay people -- this hasn't been applied
18 yet in any other area -- is that the laws require more careful
19 consideration if the effect of the law is to impose a broad and
20 undifferentiated disability on a single group. That language
21 comes from *Romer*. Again, given the enormous impact, the broad
22 impact from taxes to benefits to, frankly, responsibilities
23 like antinepotism and anti-conflict statutes, it's clear that
24 the marriage laws do exactly that.

25 And one more point about rational basis. While the

1 State argues that we somehow wrongfully suggest that many
2 courts have found that state laws fail to establish a rational
3 basis, they don't disagree with any of the citations we raise.
4 And in their case three of the five cases they cite predate
5 *Windsor*, some by as much as ten years. That's footnote 8 on
6 page 24.

7 Now, the State only offers really two rationales, and
8 I'm going to get back to them -- I'm going to get to them right
9 now. The first rationale they offer -- well, let me back up.
10 So when you're doing rational basis review, whether it's the
11 more careful consideration kind that I just talked about or
12 plain vanilla rational basis review, there are at least two
13 things that have to be satisfied. One, the objective has to be
14 a legitimate governmental objective; and, two, there has to be
15 a rational relationship between that legitimate governmental
16 objective on the one hand and the classification that's made in
17 the statute.

18 The first of the two rationales that the State offers,
19 which is an argument somehow that it's okay to discriminate
20 against gay people because we want to wait and see how things
21 pan out or because we want to exercise caution about the
22 supposed negative impacts of gay marriage, that's not a
23 legitimate objective in the first place.

24 At best wait and see is a policy objective -- is not a
25 policy objective -- excuse me -- it's a political philosophy.

1 There are no cases which I am aware of other than the recent
2 Sixth Circuit decision by Judge Sutton that have upheld in any
3 context it is okay under rational basis to treat a group of
4 people differently simply by virtue of the fact that that's
5 always the way they've been treated.

6 Actually, it's not an independent objective at all.
7 What this argument is is because things have already been done
8 this way, they should continue to be always be done this way.
9 That's not a policy objective. That's --

10 THE COURT: What's your response to *Brown v. Board of*
11 *Education* and the Supreme Court putting a proviso in that in
12 *Brown I* or *II* all deliberate speed and that sort of reined in
13 states from doing anything from 1954 until decades later
14 because the Supreme Court decided that they would implement
15 *Brown* with all deliberate speed?

16 MS. KAPLAN: Yeah. That was clearly done by the
17 Supreme Court at a time out of a fear, whether legitimate or
18 not, probably legitimate, that there would be so much social
19 unrest. I don't know if they were right or not, that if it
20 didn't -- they didn't do it with, quote, unquote, all
21 deliberate speed that there would be a problem.

22 In this context there's no issue. Gay people have
23 been married in Massachusetts now for ten years. Now, I
24 agree -- I concede that the Commonwealth of Massachusetts is
25 different than the State of Mississippi. But there's been no

1 rioting on the streets of Massachusetts. There's been no
2 social unrest in the state of Massachusetts. Indeed, as we
3 cited in our reply brief, rates of divorce in Massachusetts
4 have gone down over the last ten years.

5 And, again, look at the other states. We don't have
6 to use Massachusetts as an example. Look at states recently
7 that have allowed gay marriage to happen: Utah, Oklahoma,
8 Virginia, North Carolina. I haven't seen any news reports of
9 social unrest in any of those states. So while I understand
10 what the Supreme Court's concerns were in *Brown*, I just don't
11 think they apply here. And I think we've seen that over the
12 last several years.

13 THE COURT: Thank you.

14 MS. KAPLAN: Moreover, I think the fundamental
15 problem, as we put it in our brief, is that there's no limiting
16 principle on this supposed objective. When is wait and -- have
17 we waited enough? What's the answer?

18 I think that people who make this argument
19 fundamentally are saying that there never -- there will never
20 come a time in which we've waited long enough. And I think
21 what that suggests is that this objective really is not about
22 waiting or caution; it's about a fear of people who appear to
23 be different, precisely the kind of thing that the court was
24 worried about in *Romer* and in *Windsor*.

25 There's really only one other rationale that the State

1 proffers here and that is that the discrimination against gay
2 people and marriage is justified because it, quote -- and I'm
3 reading from their brief -- promotes opposite sex marriage to
4 encourage biological parents to establish and maintain stable
5 family relationships.

6 Here the problem is not the objective. I totally
7 agree with the State that that's a legitimate, indeed, as a
8 parent, a very good governmental objective. We should want to
9 encourage stable family relationships. The problem here is
10 that there is no connection between that objective and
11 discriminating against gay people.

12 First of all, most -- the vast majority of the
13 benefits and protections that come with marriage have nothing
14 whatsoever to do with children. Paying your taxes, conflict of
15 interest rules, ability to visit a spouse in the hospital, have
16 nothing to do with whether the couple has children.

17 And there is no reason to believe that any straight
18 couple, any young woman who accidentally gets pregnant -- and
19 it happens. I don't deny that -- will decide to get married
20 because gay people can't. That's a degree of logic or supposed
21 logic that just goes beyond what I think anyone can rationally
22 consider.

23 Judge Posner made this point quite wittily when he was
24 discussing Indiana's marriage ban. He said, "Indiana's
25 government thinks that straight couples tend to be sexually

1 irresponsible...and so must be pressured to marry, but that gay
2 couples are model parents...so [they] have no need for
3 marriage. Heterosexuals get drunk and pregnant, producing
4 unwanted children; their reward is to be allowed to marry.
5 Homosexual couples do not produce unwanted children; their
6 reward is to be denied the right to marry. Go figure."

7 THE COURT: Is there any credence to the notion that
8 the State -- part of its rationality would be to encourage
9 heterosexual activity, heterosexual marriages? Is that a basis
10 on which it could claim that it's rational?

11 MS. KAPLAN: Yeah, again, it's the same problem as the
12 accidental procreation argument. Again, I think the State can
13 and should want to encourage straight couples who are in
14 relationships to get married even if they don't have children.
15 But it's, again, impossible really to presume that any straight
16 couple is going to make a decision about whether to get
17 married, throw a party, buy a wedding dress, all this stuff
18 that you do, based on the fact that gay people can't.

19 I mean, here the issue is not -- straight people
20 should have marriage. We totally agree with that. We like
21 marriage. The issue here is whether gay people should have it
22 too.

23 And to be clear, no one is arguing that gay people
24 should have the right to marry under any religious institution
25 whatsoever. We are in federal court. This is a country that

1 has separation of church and state. We are only arguing for
2 the rights and privileges of marriage under state law.

3 Churches can and should continue to follow whatever their
4 religious beliefs are in terms who they want to marry or not.

5 The law, of course, does actually have an impact here.
6 We've -- I've already established I think it has no impact on
7 straight people. But it does have an impact on people and
8 those are gay people. It adversely impacts the thousands of
9 gay couples who have kids who live in Mississippi. And here,
10 interestingly enough, Mississippi presents perhaps the most --
11 the strongest case for this because Mississippi has the highest
12 percentage of gay couples raising children in the nation.

13 Although -- and I mentioned this before -- as Justice
14 Kennedy explained in *Windsor*, laws that discriminate against
15 gay couples humiliate the children being raised by same-sex
16 couples. I really can't overexaggerate that point. Up until
17 *Windsor*, all the litigation that happened on this was whether
18 or not gay people, as your Honor discussed earlier, made bad
19 parents. And those issues were certainly briefed before the
20 Supreme Court in *Windsor*. Most of the amicus briefs, frankly,
21 were devoted to that issue with -- on the other side with gay
22 people are bad parents.

23 The Supreme Court not only did not mention that, in
24 fact, even the dissenters did not mention that; but instead of
25 mentioning that, they change it from an issue about whether gay

1 people are bad parents to it being an issue about the harm to
2 children who have gay parents and don't get these benefits.
3 It's a complete shift in paradigm.

4 Finally, if the Supreme Court -- I mean, excuse me --
5 if the State of Mississippi had truly wanted to preserve
6 marriage for straight biological parents, then there are a lot
7 of other things they could do that would make a hell of a lot
8 more sense instead of excluding gay people and having this
9 discrimination.

10 It could prevent the elderly from getting married.
11 They can't have biological kids. It could prevent the
12 infertile from getting married. As the Ninth Circuit said in
13 *Latta*, it could criminalize certain kinds of assisted
14 reproductive technologies or adoptions. It hasn't done any of
15 those things. And, of course, it's not going to do any of
16 those things.

17 And what that suggests, again, is that this
18 justification is not really a justification about helping
19 families or helping stable families. It's a justification that
20 really has to do with excluding gay people, which, again, is
21 exactly what the Supreme Court in *Windsor* and *Romer* has said a
22 state cannot do.

23 So I think I've covered all the arguments. If there's
24 any questions your Honor has, I'm happy to answer them. I
25 apologize again to the court reporter for speaking too quickly.

1 I need to slow down my brain wiring and I will try.

2 THE COURT: Well, let me ask you an issue that was not
3 raised. I think one of these couples is married and was
4 married in a state that allowed same-sex marriage.

5 MS. KAPLAN: Right.

6 THE COURT: And Mississippi does not recognize that.
7 I don't know if the briefs really address the full faith and
8 credit sort of issue, but what about the state not -- having
9 the option of choosing what marriages it will recognize? Does
10 it -- for example, a person from New York who's married to a
11 first cousin, when they come to Mississippi, are they still
12 married in Mississippi?

13 MS. KAPLAN: Right. So the law on this in most
14 states -- and I assume in Mississippi it's the same -- is that
15 Mississippi will recognize out-of-state marriages that could
16 not be performed in Mississippi as long as those marriages are
17 not -- as long as there's not a statute that says those
18 marriages are void under Mississippi law or the -- there's a
19 Mississippi statute or it's clear that the marriage is so
20 contrary to Mississippi public policy stating its laws that
21 Mississippi wouldn't recognize it.

22 So that -- and, in fact, it's interesting. So if a
23 first-cousin marriage -- couple moves from New York to
24 Maryland, Maryland would hold that marriage to be void, believe
25 it or not. I don't think that they've ever enforced it, but,

1 technically, the marriage would be void.

2 Here given the existence of these statutes, the
3 question about whether the marriage -- I think the Maine
4 marriage should be recognized in Mississippi really collapses
5 into the question of whether those statutes are constitutional.
6 So for that reason we cannot independently brief it. I think
7 the issues become the same.

8 THE COURT: We do have a couple that's here that's
9 married that are plaintiffs in this case. I guess if the court
10 strikes down --

11 MS. KAPLAN: Exactly --

12 THE COURT: -- the court strikes down the statute and
13 the Constitution says that that's unconstitutional, then by the
14 mere fact of the court striking that down, that their marriage
15 becomes legitimate.

16 MS. KAPLAN: Exactly. There have been, your Honor --
17 and I'll try to get directly to what you're asking. There have
18 been people who have raised this issue under full faith and
19 credit. Some authority would suggest full faith and credit is
20 really about judgments rather than marriage licenses. There
21 are other people who disagree with that.

22 Again, I think if it was litigated, this recognition
23 issue, in Mississippi state court, it could come down to
24 whether Mississippi statutes are constitutional or not. And
25 that's exactly the issue that we're litigating here, if that's

1 helpful.

2 THE COURT: With respect to if the court were to
3 recognize same-sex marriage as a fundamental right under the
4 rubric of marriage -- I'm not sure if the State raised what
5 some might raise, a parade of horrors, that is, extending --
6 or blessing that right, if you will, or expanding it to other
7 things, for example, would they have a fundamental right --
8 for example, I think in the Ninth Circuit that there was this
9 issue about jury service and how *Batson* would apply in that
10 context. What about jury service? What about employment
11 discrimination? What about housing discrimination? If the
12 court were to sanction this and says that it is a fundamental
13 right --

14 MS. KAPLAN: Right.

15 THE COURT: -- I know Mississippi has this Religious
16 Restoration Act or something like that that they just passed
17 recently where business owners can choose not to serve or -- I
18 guess, persons who are homosexuals. If the court finds that --
19 that they have a fundamental right --

20 MS. KAPLAN: Right. Or I think what your Honor is
21 also getting at is if the court finds there's heightened
22 scrutiny.

23 THE COURT: Heightened scrutiny.

24 MS. KAPLAN: Yeah, if you'll let me finish it. Look,
25 this --

1 THE COURT: You said it much better.

2 MS. KAPLAN: Those issues -- those issues aren't
3 before this court, obviously, and we're not challenging -- I
4 think it's called the Religious Freedom Restoration Act here.

5 Clearly, if this court concludes, as I think it
6 should, that gay people should get heightened scrutiny, there
7 will be serious challenges to any laws that on their face in
8 Mississippi treat gay people differently. I think those laws
9 won't be constitutional. I don't think they are constitutional
10 today.

11 The Religious Freedom Restoration Act, as I
12 understand, is state -- as it's stated is a neutral law.
13 Doesn't apply just to gay people, even though there's some
14 evidence to suggest that that was what was behind it. So that
15 would have to be litigated in each context.

16 Clearly, I don't think the State of Mississippi
17 itself, the government, if we win under heightened scrutiny can
18 fire someone solely because they're gay. I, frankly, don't
19 think the State of Mississippi even today has any intention of
20 doing that. But that is -- basically, in giving a group
21 heightened scrutiny, you're saying that the legislature should
22 rarely, rarely, if ever, be in the business of treating them
23 differently.

24 And if you look at women, which is probably the most
25 appropriate context, for the most part you can't treat women

1 differently. In certain context you can. There's the Justice
2 Kennedy opinion about pregnancies and whether you can treat
3 women differently when they're pregnant, in pregnancy, and he
4 said you could, with dissents by Justice Ginsburg and others.
5 So it really depends on the circumstances.

6 But I certainly agree that the conclusion your Honor
7 makes, which I think, frankly, is the commonsense conclusion
8 today, believe it or not, of most Mississippians, certainly
9 most young Mississippians, is that the legislature should not
10 be in the business of passing laws that treat gay people one
11 way and straight people another.

12 THE COURT: Well, what about -- and that takes me to
13 the question about the constitutional amendment. Should the
14 court look at that process any different from the statutory
15 process?

16 MS. KAPLAN: I think I forgot to mention this. I'm
17 glad your Honor raised it. I think the fact that this was a
18 constitutional amendment really belies the State's argument
19 that they were exercising caution. Essentially enshrining
20 discrimination by constitutional amendments, so taking it away
21 from the legislature completely and setting it in stone unless
22 there's another statewide popular referendum, makes it clear
23 that's not caution. Caution would be allowing the normal
24 democratic process to continue, allowing legislatures to make
25 decisions. That's setting discrimination in stone. So I think

1 the fact there's a constitutional amendment is relevant to
2 that.

3 I also think, as your Honor pointed out, that it's
4 relevant to the likelihood that the State of Mississippi today
5 is somehow going to change things on its own, that even though
6 attitudes about gay people clearly have changed, that there's
7 so much political power that gay people have that they can
8 change a constitutional amendment.

9 I'm not aware -- I'm scanning in my head. I'm not
10 aware of any suit in this country that has overturned by
11 election or by popular referendum a state constitutional
12 amendment discriminating against gay people. There was
13 legislative success in New York and in others states, but there
14 was not constitutional amendments on the books. I'm going to
15 double check that, but that's my understanding.

16 THE COURT: Okay. Now, and you want the court to say
17 that there's heightened scrutiny. So I assume, then, there is
18 no rational reason under rational basis that the State can
19 argue today, tomorrow or yesterday about this -- there's
20 nothing that would pass rational basis scrutiny?

21 MS. KAPLAN: Yeah. If you think about the decision
22 tree your Honor has in front of you, you could do heightened
23 scrutiny. We think your Honor should. But I think it's in
24 certain ways the kind of -- it goes to the heart of what's
25 really going on here. But the court doesn't have to do that.

1 And like the Supreme Court and many other courts, you
2 could say that I don't need to reach the heightened scrutiny
3 question, putting aside *Baker v. Wade*, because it's clear that
4 these laws don't even meet rational basis.

5 And, again, we only have two rationales. The first is
6 caution, and that's not a real rationale, to begin with. It's
7 not a legitimate government objective. And the second is this
8 stuff about parents and children. And there, while helping
9 parents and children is definitely a legitimate governmental
10 objective, it's not in any way connected to excluding gay
11 people from marriage, even rationally. So I think your Honor
12 could do it under heightened scrutiny or fundamental rights.
13 It could also easily decide, as many, many courts have, under
14 rational basis.

15 THE COURT: Thank you, Ms. Kaplan.

16 MS. KAPLAN: Thank you, your Honor.

17 THE COURT: At this time the court is going to take a
18 15-minute break.

19 (RECESS)

20 THE COURT: You may be seated. I apologize for the
21 delay.

22 MR. MATHENY: May it please the court, your Honor.

23 THE COURT: You may proceed.

24 MR. MATHENY: Your Honor, I have to say at the outset
25 that one thing that's important about this is the lens that

1 we're looking at this case through in terms of preliminary
2 injunctive relief. That's the question, the legal standard
3 that's before the court.

4 And I got to thinking about it and it was -- it had
5 dawned on me that in my -- in my prior private practice, the
6 only few times that I had ever dealt with preliminary
7 injunctive relief was when I was actually litigating against my
8 current client with Jim Craig on some issues. Since I've gone
9 to the AG's Office, preliminary injunctive relief comes up much
10 more often, and the standards are important. So I'll be
11 talking about that throughout my argument here this morning.

12 Another thing about this particular kind of case --
13 and I would add that it's unlike -- certainly unlike any that
14 I've ever had ever and certainly unlike any at the Attorney
15 General's Office, but one thing that jumps out at -- about this
16 case and this kind of litigation that's been going on around
17 the country is that there's an important theme in how courts
18 approach the questions and the orderly process that occurs.
19 It's both within the case and I think it touches other issues
20 in it.

21 Counsel had mentioned you have to look at this with
22 kind of like a decision tree. I think that -- that's right and
23 we're on the same page there. There's an orderly process here
24 that's involved. So my argument's going to address the
25 arguments that counsel made in the order that it was taken up.

1 And I think the most important place to start with that is the
2 *Baker v. Nelson* case.

3 There's no doubt that *Baker v. Nelson* decided the
4 issues that we're talking about. I think what the real
5 question about *Baker v. Nelson* is is what does it mean now.
6 Whether you're talking in terms of what is its precedential
7 value or what weight do you put on it, that's the real question
8 is what does it mean today.

9 And that's something that was kind of hard for me to
10 grapple with at first because it followed a practice that at
11 least since I've been practicing law the Supreme Court hasn't
12 done which is, as we know, before the law changed in 1988,
13 whenever there was a case that was decided by a state -- the
14 highest court of the state that raised federal issues, there
15 was an automatic right of appeal to the Supreme Court.

16 So they had -- they had to take those cases and either
17 address them on the merits by taking them up the way we think
18 of cases going up today or summarily affirming or dismissing
19 for want of a substantial federal question. So we don't see
20 many of those kinds of rulings anymore because the law has
21 changed.

22 But there's no question that when the court -- back
23 before the law changed when they decided a case in that manner,
24 that it was a decision on the merits and it's a precedential
25 value of the court -- a decision with precedential value of the

1 court. Sorry. And that precedent -- that highlights this
2 orderly process I'm talking about.

3 I think it undergirds the principle that when there is
4 a change in a controlling precedent, that that precedent should
5 come from the court that set the precedent. It was even
6 mentioned in the argument before the break, you know, that
7 lower courts are required to follow Supreme Court precedent
8 even if it's wrong. And that's what gets us into this
9 doctrinal developments argument that has been spoken about and
10 written about in the briefs and appears in all the cases that
11 have addressed *Baker* all over the country.

12 About the doctrinal developments, I mean, one thing we
13 know is I think that there's pretty solid evidence that when
14 the Supreme Court decided *Romer* and when the Supreme Court
15 decided *Lawrence* that that did not explicitly, certainly not,
16 or even implicitly overrule the *Baker v. Nelson* precedent.
17 Lots of courts looked at that issue. The Eighth Circuit had
18 said that it -- that it didn't -- and even some as we cite in
19 the brief and we know recently the Sixth Circuit and the
20 district judge in Puerto Rico even before and after *Windsor*
21 have said that the doctrinal developments didn't displace *Baker*
22 *v. Nelson*.

23 We also in the earlier argument and as we attached to
24 our brief -- it was actually kind of news to me because it was
25 an unreported opinion, but as soon as it was decided that I was

1 the one that was going to have to come over here and argue the
2 case, somebody had mentioned to me that Judge Sumner and
3 Judge Lee had looked at the issue.

4 And, yeah, it's true that it was a pro se prisoner
5 case, but a couple of points about that. One, Judge Lee said
6 in his order that adopted Judge Sumner's report and
7 recommendation. He said that the court is concerned about this
8 and has done its own research into the issue and that the law
9 is clear on that, on this point.

10 The other thing about it is --

11 THE COURT: That decision was from 2006?

12 MR. MATHENY: That's correct, your Honor.

13 THE COURT: And so from 2006, though, to 2014 what
14 all -- even if we looked at that window, what all has happened
15 with respect to how many times *Baker* has been cited to or
16 asserted in these briefs before the Supreme Court? What I'm
17 concerned about is that the issues -- and I understand we're in
18 a different position when we talked about the cases that the
19 Supreme Court denied cert on back in October, but the *Baker v.*
20 *Nelson* thing was placed at the Supreme Court's steps time and
21 time and time again with *Windsor* and even after, and they've
22 refused to mention it.

23 MR. MATHENY: Well -- and, your Honor, that's correct.
24 They have not mentioned it by name. And it gets me to where my
25 next point was. My point with the other was simply that prior

1 to 2006, after *Romer* and *Lawrence* had been decided, it was not
2 accepted that those were doctrinal developments that changed
3 the precedential issue.

4 THE COURT: I mean, the Second Circuit in *Windsor* said
5 "Even if *Baker* might have resonance in 1971, it does not
6 today." How clearly is that to a message to the Supreme Court
7 that *What you said in Baker does not apply to us, we believe,*
8 *on the Second Circuit with respect to Windsor?* And that seems
9 to me that's a repudiation -- flat repudiation of what *Baker v.*
10 *Nelson* says. And the Supreme Court, again, it has -- has the
11 authority at least to tell the Second Circuit, *No, it does have*
12 *some resonance, but they didn't.*

13 MR. MATHENY: That's correct, your Honor. I think I
14 would say that it's also equally true that another way to look
15 at that would be that when the Supreme Court took up the Second
16 Circuit's decision and didn't address that issue and didn't
17 feel the need to address that issue because from *Windsor* itself
18 it -- I think it's pretty clear that they're basing their
19 decision on the basis of other issues. So they didn't feel the
20 need to address *Baker*.

21 I mean, it's hard to guess why the Supreme Court did
22 or didn't do something in any instance and particularly here
23 where, like counsel said, it's an issue that the BLAG or how --
24 Bi -- I don't know what it stands for -- B-L-A-G that was
25 defending the law after the President had decided not to, they

1 raised that issue in their briefs. It seems to me that if the
2 court thought that that had anything to do with the case, then
3 they would have raised the issue in the opinion.

4 THE COURT: Should this court look at the denial of
5 certs at all? I mean, because you could look at all the
6 briefing that was done in the courts below as well as the
7 arguments of those courts as well as the petitions for cert and
8 whatnot that were filed at the Supreme Court. Could the court
9 look at that and -- you know, because if *Baker v. Nelson*
10 controlled, when all of those cases came up to the Supreme
11 Court, couldn't the court have just simply slammed the door on
12 them and said, *See Baker v. Nelson. All of y'all are wrong.*
13 *Case closed. It's over. We said it in 1971 or '72 that it's*
14 *over and done with, period?* Couldn't they have done that?

15 MR. MATHENY: They could, your Honor. And I think
16 that that too is a good point. It also folds back into the
17 point that I was making earlier. Cert denials -- unlike
18 dismissals for want of a substantial federal question as it was
19 back before 1988, cert denials are not an endorsement of what
20 the courts have done below. In fact, the court has said, *When*
21 *we deny cert, that means we deny cert and you're not supposed*
22 *to guess why.*

23 Now, given the facts and circumstances here, we
24 know -- and I've read, you know, that Justice Ginsburg has
25 spoken to students in Minnesota about, well -- saying why the

1 court denied cert, and that was because there was no circuit
2 split, so there was no need for us to accept cert. There's
3 that rationale. There's tons of other rationale that could be
4 assigned to the denial of cert. But one thing that the orderly
5 process of how courts work tells us is that it's not because
6 it's an endorsement of what the lower courts did below.

7 THE COURT: What about *Windsor*'s citation and wrapping
8 its arms around *Loving* in *Windsor*? Equal protection and due
9 process, which is contrary to -- isn't that contrary to *Baker*
10 *v. Nelson*? Doesn't *Baker* -- *Baker v. Nelson* says, *There's*
11 *nothing justiciable here*; and *Windsor* says, *Well, there is*.
12 See *Loving*. *Loving*, as we know, talks about equal protection
13 and due process and all of that. So isn't that a repudiation
14 of *Baker v. Nelson*?

15 MR. MATHENY: That's something that's interesting,
16 again, about this orderly process, your Honor. In -- the
17 *Loving* case was decided in I think it was 1967 or '68. *Baker*
18 *v. Nelson* came after that. And it's a point that comes up
19 later on when we're talking about the fundamental rights
20 analysis and the heightened scrutiny issue. But while not
21 every court has accepted it that has looked at it since, I
22 think that there are many different ways to read *Windsor*.

23 I can remember back many months ago now in the context
24 of the other case that's pending at the Mississippi Supreme
25 Court, the Texas Supreme Court was having an oral argument

1 about *Windsor* and what it means and trying to grapple with what
2 it means. And the justice that was questioning the counsel
3 made the point, you know, *Windsor* has a little bit of
4 everything in it for everybody. Is it decided on federalism?
5 Is it decided on equal protection? Does it deal with
6 fundamental rights?

7 The State's position with respect to *Windsor*,
8 obviously, lies in the federalism aspects of it and thinks that
9 that's what it stands for, that when it comes to the federal
10 government -- when New York decided that it was going to
11 recognize same-sex marriage and authorize that as a matter of
12 state law, that the federal government could not ignore that
13 choice and deny the federal benefits to New York couples.

14 But in doing that, what it was saying to the state
15 was, *You have a -- you have a choice. You get to decide how*
16 *you are going to define marriage in your state*, which is
17 undoubtedly one of the most -- it's certainly not I think the
18 most, but it's right up there with one of the biggest important
19 aspects of the state's police power and we've had authority to
20 regulate it for a very -- since the beginning of the United
21 States.

22 So that -- what *Windsor* speaks to and what it means,
23 it's important when it comes to the *Baker v. Nelson*; but I
24 think specifically on the *Baker v. Nelson* point, it's like you
25 pointed out, they didn't explicitly overrule it. And there

1 are -- there's the State's viewpoint. I think many ways you
2 can read it as not having implicitly overruled *Baker v. Nelson*
3 either.

4 THE COURT: So what doctrinal developments -- what
5 doctrinal developments could exist in the State's world that
6 would say that the case has been implicitly or otherwise sort
7 of overruled? I mean, we have a lot of evidence here. What
8 additional things could it say other than the fact that they --
9 they take up a case and say, *See Baker v. Nelson, period?* What
10 else would we need?

11 I mean, the Supreme Court, for example, has done
12 per curiam summary reversals of the Fifth Circuit recently,
13 yesterday -- Monday -- Monday on a case saying, *You all got it*
14 *wrong. You've been looking at the notice pleading doctrine*
15 *wrong.* So they took up the case, PC reversed. *Tolan v.*
16 *Cotton*, misapplication of how you deal with qualified immunity.
17 They took it up and they PC reversed, said, *You got it wrong.*

18 So what else would the State suggest short of that I
19 guess that could show that the doctrinal developments no longer
20 exist because *Baker v. Nelson* was decided before *Frontiero* I
21 believe and the *Virginia v.* -- the *VMI* case and all those where
22 they -- where they not expanded the rights of women, but where
23 they acknowledged the gender discrimination, same-sex
24 discrimination and elaborated on that, you know, talked about
25 women not -- well, working in the workforce and not necessarily

1 being tied to their home? What other things would the State
2 suggest that the court needs to say that the doctrinal
3 development no longer underpins *Baker v. Nelson*?

4 MR. MATHENY: Well, first, I would say with respect to
5 the gender discrimination, I think you have to cabin that. And
6 as counsel said, they -- they mentioned that in the footnote in
7 their brief, but that's not what they're arguing here today,
8 that they're relying on gender discrimination as the basis to
9 raise the scrutiny applied here.

10 But I think the answer, your Honor, has to go back
11 to -- my point is that a change in a controlling precedent
12 should come from the court that laid the precedent. And I
13 would offer you this example, because, like I said before, this
14 notion of how the Supreme Court used to handle the docket and
15 how this following-precedent stuff works, it confused me and it
16 was something that I had to look into when I first started
17 grappling with this.

18 And so one case that I felt -- and I'm not saying that
19 this case is a same-sex marriage precedent that has to be
20 followed. I'm not breaking any new ground. I'm not the first
21 attorney that's ever been able to find this case and argue
22 something brand-new, but I think that this tells you a lot
23 about the orderly process that's at play here.

24 In 1988 the Fifth Circuit decided a case that involved
25 the Texas Constitution. It was Article 5, Section 1-a. And

1 what that Texas constitutional provision provides is -- or at
2 least at that time it provided an absolute rule that when
3 judges reach age 75 they have to vacate their office. This is
4 elected judges in Texas.

5 So the Fifth Circuit -- the district court had upheld
6 the challenges against the constitutional provision, which were
7 equal protection challenges and a fundamental right challenge
8 based upon First Amendment associational freedoms, because
9 elected judges implicate the right to vote for those elected
10 judges. But, in any event, you have an equal protection claim
11 and a fundamental right and the judge sues and loses in the
12 district court. So he goes to the Fifth Circuit.

13 Judge Goldberg, who was 82 when he had to write the
14 opinion and he certainly pointed out that there's a long
15 tradition of fine judges in the history of our country that
16 have served past age 75, Judge Goldberg looked at the -- at the
17 case. There was a dismissal for want of substantial federal
18 question that the Supreme Court had applied -- had ruled in a
19 previous case that had come out of New York, because
20 New York -- they elected their judges at that time and their
21 upper age was 70. The New York Supreme Court had said that was
22 fine. The U.S. Supreme Court affirmed by dismissing for want
23 of substantial federal question.

24 Judge Goldberg had to recognize that that bound his
25 decision in -- it's Judge Hatten's case in the Fifth Circuit.

1 It was binding. But he gave us some insight because Judge
2 Goldberg, nevertheless, went through and explained all the
3 reasons, the analysis applicable to the equal protection, age
4 discrimination claim and the fundamental association right, and
5 he had to find that he had to follow the summary disposition by
6 the U.S. Supreme Court even though he totally disagreed with
7 it.

8 And, quote, he had said, Perhaps unfolding years will
9 open eyes that are now closed. Until then we are bound by
10 precedent to affirm. The case is cited at 854 F.2d 687. It's
11 *Hatten v. Rains*. Judge Jolly concurred in the opinion.

12 And one note -- and this is just purely a note -- but
13 since that time, Texas has amended that statutory -- that
14 constitutional provision -- I'm sorry -- four different times.
15 They haven't decided that -- that they should change the age
16 specifically about the age 75 being mandatory retirement, but
17 they have tweaked it a little bit to allow for sitting judges
18 to serve a little bit longer. And the point being is it's not
19 like they couldn't change the constitutional provision to
20 address issues like that that had come up.

21 In any event, I think that that illustrates the
22 orderly process that we're dealing here with *Baker v. Nelson*.
23 When you're looking at issues like doctrinal developments, when
24 you're looking at issues, like the court has said, *You've got*
25 *to leave it to us to overrule our own precedents*, when you're

1 trying to read between the lines, if you will, when the Supreme
2 Court doesn't explicitly say, *We're abandoning something that*
3 *we've decided earlier*, I think that that's important.

4 It's important to how courts work and it's important
5 to how -- it's important to how democracy runs, because people
6 need to be able to believe in the court system; and if you
7 don't follow the order, then it certainly doesn't mean that
8 there will be riots that break out in front of the courthouse
9 today, but over time it is something that erodes the public's
10 confidence in the system that's in place for orderly
11 resolutions of disputes.

12 THE COURT: When a lower court tells a higher court
13 that your earlier decision has no resonance today, no
14 application to this case, and that case -- and that court takes
15 that decision up and rules on that decision, isn't there an
16 obligation to that court to at least put in a footnote or
17 something to say, as an aside, *It does have resonance, but*
18 *we're saying that this is the* -- I mean, that's what I'm still
19 grappling with, because the Second Circuit told the world that
20 *Baker* had no resonance in the *Windsor* case.

21 *Windsor* went up to the Supreme Court and not one
22 judge, not one judge on the Supreme Court, said, *Aha, but Baker*
23 *does have resonance, and I concur, I dissent, I disagree, I*
24 *whatever*. Doesn't that speak volumes as well? I mean, silence
25 sometimes is golden.

1 MR. MATHENY: It brings up two points, your Honor.
2 And I guess the first is -- and I want to be careful whenever
3 I'm talking about what judges are obligated to do. I would
4 never purport to tell you that you must do this or that.

5 THE COURT: Okay.

6 MR. MATHENY: But I would say this, not mentioning it
7 in the Supreme Court opinion in *Windsor*, what it tells me is
8 that it was not relevant. They didn't have to address it. And
9 the reason that they didn't have to address it is because what
10 they were doing was telling the federal government that you
11 cannot disturb New York's choice that it made through a
12 deliberative process, through a democratic process that some
13 people have faith in and some people don't, but New York
14 decided something and the federal government could not disturb
15 that.

16 That's a totally different issue than what was raised
17 in *Baker*, and that -- because what was raised in *Baker* is what
18 we have here which is as a matter of the Fourteenth Amendment
19 do the states have the right to define marriage within their
20 borders in terms of between a man and a woman. That's my
21 answer to that.

22 I would also point out that at the same time -- and I
23 think I pointed it out in my brief, your Honor. At the same
24 time that the New York -- that the -- I'm sorry -- that the
25 Second Circuit was looking at this, the First Circuit looked at

1 it as well and said, *We've got to adhere to the Baker v.*
2 *Nelson*. So you have two -- two circuits. And I don't -- I'm
3 not saying they think alike because they're right next to each
4 other or anything like that, but the point being is people were
5 still viewing it differently at that point. People are still
6 viewing it differently now.

7 THE COURT: Not many. Right? I mean, most of the
8 courts that have ruled on this issue, they're nearly unanimous.
9 I understand the Sixth Circuit and maybe Puerto Rico maybe.

10 MR. MATHENY: Well, your Honor, I don't think you can
11 play a numbers game with it because I don't know how you would
12 calculate these district judges found this, these district
13 judges over here is a small number and they found this, and
14 then you subtract Sixth Circuit overruled all these district
15 judges. It's not a game of math.

16 I think what it is is it's a choice between two
17 different lines of reasoning. And the State's position is that
18 the courts, specifically Judge Sutton in the Sixth Circuit and
19 the judge from Puerto Rico, that they have the better view of
20 *Baker v. Nelson*. And that's what we're asking the State to
21 accept and apply here, adhering to the orderly process of how
22 courts are supposed to work.

23 If your Honor doesn't have any other questions about
24 *Baker v. Nelson*, I'll move on to the next line of decisions in
25 the decision tree.

1 THE COURT: Okay.

2 MR. MATHENY: I see the issue as the issue of what
3 kind of scrutiny are you supposed to apply to these laws that
4 are at issue. We know we have heightened scrutiny and that
5 there's ways that the Supreme Court has defined that. We have
6 intermediate scrutiny that applies in some other instance, and
7 we have rational basis scrutiny.

8 What I heard counsel talking about was something that
9 I've read in having to look and research these issues more
10 extensively recently, but this idea that some sort of different
11 kind of scrutiny applies because it's -- it's heightened
12 scrutiny, but it's rational basis because it's rational basis
13 with a careful considerations -- or with careful considerations
14 in mind. I want to address that as I go through it, but I
15 think the most orderly way is to start with the suspect class
16 issue because -- and it's a point that had come up.

17 It's true there are those four factors and the four
18 factors about how you identify a class that should be granted
19 or be identified as a suspect class. Those four factors -- and
20 I can't say that they -- that none of those four factors are
21 met here, that none of those four factors are important factors
22 and that some of those factors and good reasons for those
23 factors apply to gay people and to same-sex couples. It's
24 certainly -- there's some points in there that are -- that are
25 inarguable.

1 There are a few that are important that I think your
2 Honor was digging into with the questions with counsel. One
3 thing that got pointed out when you were talking about
4 political powerlessness, the standard is not political
5 powerness in terms of a political power where you can get
6 anything that you want. The standard means less than that.
7 And that there -- there are other reasons, again, most recently
8 pointed out with the Sixth Circuit case about the merits of
9 applying the four-factor test, why there's difficulty --
10 difficulty in being able to do that here.

11 For me and the way I have to rationalize it and to
12 represent my client, I look at it in terms of the orderly
13 process that I've been talking about. There was some debate
14 here about, well, the Supreme Court hasn't decided it. It
15 hasn't said affirmatively or -- but what we do know is the
16 Supreme Court's never applied anything more than the rational
17 basis test when it's dealing with issues of a suspect
18 classification in terms of sexual orientation discrimination.

19 And it was pointed out, the *Baker v. Wade* issue -- I
20 know I addressed it in my brief, your Honor. *Baker v. Wade* did
21 deal with issues that were related to the *Bowers v. Hardwick*
22 and then the *Lawrence* case. And, yeah, there would be a --
23 there is an argument, a good argument that *Baker v. Wade* has
24 been displaced by those Supreme Court decisions.

25 When the Fifth Circuit has looked at it -- and, again,

1 I don't think that it matters that it's a -- in the pro se
2 context, because I certainly know in your Honor's court and
3 certainly at the Fifth Circuit it's not as if the hardworking
4 clerks and judges down there take pro se arguments lightly.

5 But when the -- when the Fifth Circuit has looked at
6 the issue and -- most recently and said, *Are we talking about a*
7 *suspect class when it comes to sexual orientation?* and it said
8 no. And what it relied on in doing that was not *Baker v. Wade*.
9 It wasn't citing *Baker v. Wade* in the *Johnson* case that we
10 cited in our brief. What they're looking at is *Romer*, which at
11 that time I'm not sure of the sequence of cases, but that was
12 the last case that the court had decided on the issue.

13 So the State's position is that the Fifth Circuit's
14 precedent, precedent from several of the other circuits that
15 are out there -- in fact, I think it's only the Second Circuit
16 with the opinion we were talking about earlier with *Windsor* and
17 then the recent Ninth Circuit opinion that went ahead and said,
18 *There is a suspect class here and that's why we're going to*
19 *apply heightened scrutiny.*

20 THE COURT: Is it converted to a suspect class when
21 that class of individuals is targeted? Does that -- can that
22 be -- can you convert that to a suspect class if that class of
23 individuals is targeted with respect to action like DOMA? DOMA
24 specifically says that people of the same sex, we won't
25 recognize their benefits or something like that. With DOMA

1 coming after the State of New York has decided that it would
2 recognize same-sex marriage, DOMA and the mini DOMA's, like
3 Mississippi, that came forth and specifically targeted this
4 group of people, does that make it a suspect class?

5 MR. MATHENY: I don't think that the notion that the
6 laws targeted that class transforms it into a suspect class in
7 terms of how you're talking about defining suspect classes for
8 purposes of heightened scrutiny in applying Supreme Court
9 precedent.

10 Judge Sutton had pointed out, I mean, that the United
11 States Supreme Court hasn't recognized a new suspect class in
12 more than 30 years and has had plenty of opportunities to make
13 that decision with respect to sexual orientation
14 discrimination.

15 I think your Honor's question also folds into the
16 point of if you're looking for evidence and you -- you had
17 specifically distinguished between the evidence generally that
18 there has been unfortunate incidents and maltreatment in the
19 past versus -- as a whole versus in Mississippi -- and one of
20 the first things that counsel pointed to and said, *Well, look*
21 *at the law that we're here about today.* I don't know and I
22 certainly can't agree on behalf of my client that that's
23 evidence.

24 But if -- when it comes to something as weighty as
25 recognizing a suspect class for purposes of heightened

1 scrutiny, I certainly think you have to have more evidence than
2 that; and here's why. Your Honor pointed it out when you went
3 down the line of talking about how recognizing the suspect
4 class can affect other -- broader issues than just marriage
5 such as the -- the *GlaxoSmithKline* case in the Ninth Circuit
6 where that went off on jury service and -- so the point being
7 is that once the Supreme Court establishes -- or once the lower
8 federal court controlling -- whose precedent is controlling on
9 the court, once it's determined that sexual orientation is a
10 suspect class, that might open the door.

11 But the point is I think -- that makes it important
12 when you're talking about how much evidence and how weighty the
13 issue is, I'm not parading the horribles, but I'm saying that
14 saying -- saying that homosexuals -- or that gay people are a
15 suspect class has much broader implications in the -- in the
16 law than simply what the issue is that we're here about today,
17 which is where -- the specific issue of same-sex marriage in
18 Mississippi.

19 THE COURT: What about the idea of the state banning a
20 homosexual couple from adopting a child, a couple recognized by
21 another state? They can come here. Obviously, the State would
22 not deem them a couple. So, therefore, they would not be
23 eligible to adopt a child who they love and who the child --
24 and in return the child loves them. But the State stands in
25 between them. Is that sort of creating a barrier?

1 MR. MATHENY: Well, that may be something that I think
2 that you could take into account when you are going through the
3 rational basis analysis and looking at is there -- when you're
4 looking at the effect of a law, in other words, what impact do
5 our laws have on all the other laws in terms of the universe of
6 benefits and other things like the plaintiffs have pointed out,
7 when you're looking at something like that and the effect, that
8 may have some sway in -- in the rational basis analysis. But I
9 think that that's where that fits in. I don't think it's in
10 terms of *Do you -- Does that mean suspect class? Yes or no.*

11 I think the bottom-line point and the State's position
12 on it is is that the orderly process of the way the controlling
13 precedent has to be applied controls the issue about whether or
14 not -- the specific issue about whether or not you apply
15 heightened scrutiny on account of sexual discrimination --
16 sexual orientation discrimination as a suspect class.

17 With respect to the fundamental right, which is an
18 entirely different analysis not only because they've raised it
19 as a fundamental right in terms of a substantive due process
20 type claim, but it also means something different than
21 recognizing a suspect class in order to get to heightened
22 scrutiny. And that's one of the things -- and I guess maybe as
23 the lead-in to talking about the fundamental rights analysis,
24 that's one of the things that's interesting. Kind of relates
25 back to your point about all these different courts have looked

1 at these things, *Baker v. Nelson* and all these other issues,
2 and come out with different decisions on those.

3 At the end of the day, as I read them -- and I've had
4 to read them feverishly over the past few weeks to get ready
5 for this since so many of them are brand-new, but one thing
6 that comes out of it is it's -- they all agree on the result
7 that they reached, but they're not all in agreement about the
8 reasons about how to get there. They all didn't follow the
9 same decisional tree and they didn't come up with the same
10 rationale.

11 And so when you're -- in the matter of -- well, like a
12 decision tree, when you're -- when you're looking at it and
13 you're talking about the differences between a suspect class
14 issue and the fundamental substantive due process right issue,
15 that really more falls in line with what the Tenth Circuit has
16 said that decided the issue of the -- of the fundamental right.
17 You have the Tenth Circuit deciding the fundamental right, and
18 then you have the Ninth Circuit that was the suspect
19 classification, and then you have the Seventh Circuit that --
20 whether you want to call it careful consideration or animus --

21 THE COURT: Rational basis plus?

22 MR. MATHENY: Rational basis plus.

23 THE COURT: Basis with punch or something?

24 MR. MATHENY: Those things are hard to keep up with.
25 But with respect to the fundamental right, I think counsel said

1 it best is there's an issue about -- and I think the threshold
2 issue is does this *Glucksberg* test apply or not. The
3 *Glucksberg* test is, as we know, how the Supreme Court back in I
4 think it was 1997 said that when somebody wants to have
5 recognized a new fundamental right, this is the test that we
6 apply to be able to determine whether or not it is. And, as we
7 know, it means -- the test is when you carefully describe the
8 right, is that a right that's deeply rooted in the nation's
9 history and tradition.

10 We know all of these judges that have looked at it
11 have wrestled with the *Glucksberg* test and what it means and
12 whether or not to apply it. But that's the real issue is do
13 you apply that, because I think there's a pretty good
14 consensus -- I won't put words in counsel's mouth, but I think
15 that courts seem to agree that if you apply the *Glucksberg*
16 test, then the right to same-sex marriage is not something that
17 qualifies under the *Glucksberg* test as a fundamental right. So
18 the real issue becomes, well, if you don't apply the *Glucksberg*
19 test, then how does it get there.

20 THE COURT: And it's not because it's not rooted in
21 tradition and all of that? Is that why you should not apply
22 the -- or that's why the *Glucksberg* test does not apply?

23 MR. MATHENY: And I --

24 THE COURT: Or if you applied it, it wouldn't be --

25 MR. MATHENY: Yeah. And I hate to oversimplify it,

1 your Honor, but when you're looking at how marriage has been
2 traditionally defined since the beginning -- since back before
3 the beginning of the country, I think that the -- I think what
4 you see is that when you carefully describe and you ask the
5 question in terms of throughout our nation's history and
6 traditions has a right to same-sex marriage been recognized as
7 a fundamental right, I think the answer is no, because, as we
8 all know, as a matter of tradition up until -- well, really, up
9 until certainly just before the turn of the century and with
10 things like the Massachusetts ruling in 2003, that people
11 didn't think of marriage in terms of including more than
12 opposite-sex unions.

13 But that point gets into the -- if you buy the
14 argument -- and I don't think you should, but if you buy the
15 argument that *Glucksberg* is not the way to approach it and you
16 say that you're going to go analyze the fundamental right in
17 terms of a broad freedom to marry or I think some courts have
18 called it a right to marry one -- a partner of one's choosing,
19 however you formulate it, I think what it boils down to is to
20 go down that line of reasoning, you have to be able to find
21 that all these cases that support that theory that they had in
22 mind when they were talking about marriage, that they were
23 looking at it as some broad, all-encompassing fundamental right
24 that everybody has to be able to choose whoever one wants to
25 get married to.

1 And the reason why that doesn't work, whether you're
2 talking about the *Loving* case or the *Turner* case or some others
3 that they didn't cite in their brief but that are out there,
4 like the *Zablocki* case or other cases that are -- relate to
5 marriage issues, in none of those was the court speaking in
6 terms or even thinking about the notion that it was talking
7 about marriage in terms of inclusive of anything more than
8 opposite sex.

9 THE COURT: But up until *Loving*, though, everything
10 prior to *Loving* -- because *Loving* overturned about 100 years of
11 cases, it didn't recognize that -- they didn't think that
12 people of opposite races would even dare want to marry each
13 other or choose to marry each other or -- I mean, because,
14 again, they looked at it for 100 years and the segregation laws
15 were in full force by many states and federal courts. And
16 even, you know, the *Loving* couple was I guess married in
17 either -- either married in D.C. and came over to Virginia,
18 were prosecuted.

19 In 2014 your children couldn't even think that that
20 was going on in 1967 or so when *Loving* was decided. So the
21 definition -- so how they defined in the expansive way that
22 they looked at marriage in the 1800s and the early 1900s,
23 they're not even conceptualized in the opposite-race context.
24 And many of those cases dealt with blacks and whites marrying.

25 So what does the State say about that? And how can

1 you say *Loving* is different and we need to -- how can we
2 distinguish *Loving* and the broad application of *Loving* to the
3 principles here today?

4 MR. MATHENY: One thing I would say, your Honor, is
5 certainly I'm sensitive to all of the issues that were going on
6 back then with *Loving* and the circumstances. And I appreciate
7 counsel when she had mentioned that we're not trying to --
8 we're not trying to say that *Loving* and the situation in *Loving*
9 is exactly the same kind of situation we have here, but it does
10 have import.

11 And I think that the State's response to your
12 question, your Honor, is, one, it -- there is a point that goes
13 back to the -- to the *Baker v. Nelson* point in that *Loving* was
14 decided and then *Baker v. Nelson* came after that. And the
15 orderly process of the way courts work, I mean, you have to
16 assume that the court knew when it decided the case after
17 that -- that that shed some light on what it was talking about
18 in *Loving*. So I think that that's an important point.

19 I think another point -- and I can't claim to have
20 come up with this because that's one of the things about being
21 the last state to get sued to get to go to federal court and
22 having all this material out there, but I think I've also seen
23 it made the point that in *Loving* that they were talking --
24 clearly talking about opposite-sex marriage because --

25 THE COURT: Yeah, because the people were actually

1 opposite sex.

2 MR. MATHENY: They were actually opposite sex. Thank
3 you, your Honor. I didn't mean to miss the obvious. But they
4 were also talking in terms of procreation as being one of the
5 reasons with the procreation that those -- that in the *Loving*
6 case that was at issue is the reason that it was -- it was
7 reached in its decision. And we know that while today there's
8 certainly -- you can't say that 100 percent across the board
9 that men and women are the only -- that the only way that
10 people can procreate because of modern science, but that's
11 certainly the mindset that the judges had to be writing from in
12 *Loving*.

13 And it continues on with the other cases that are
14 examples of when they're dealing with marriage. And I think --
15 I certainly can't purport to be able to put out the same kind
16 of rhetoric that comes off of Judge Sutton's opinion, but I
17 think his point is that it's pretty safe to say that --
18 for example, in the *Loving* case, if it had been two opposite
19 sex -- or two same-sex-but-different-race partners that had
20 come in and that were the plaintiffs in that case, then the
21 court probably would have looked at it and said, *Well, you*
22 *can't do it because it's -- because you're of the same sex,*
23 *not --* and divorce that from the race aspect of it. But, like
24 I said, Judge Sutton makes that point much more eloquently than
25 I can standing here.

1 I think the point that what it all gets to, your
2 Honor, that it's neither because of breaking new ground and
3 recognizing sexual orientation as a suspect class or a
4 fundamental right, which is something separate and distinct and
5 a different line of rationale, but neither of those avenues, if
6 you will, are available to increase the scrutiny that are
7 applied to Mississippi's laws.

8 I think that that -- what that leaves you with is,
9 like your Honor put it, are you talking about rational basis
10 plus, or I think someone mentioned earlier -- I can't remember
11 if it was your Honor or counsel talked about vanilla rational
12 basis versus something different.

13 But I think the point is that if you are looking at
14 rational basis plus, you have to get into this issue of the
15 animus supposedly driving the law, and, you know, I get the
16 point about we can look at newspaper articles and maybe that is
17 what -- or some indication of what a legislator was thinking.
18 I don't think that that's proof and I certainly don't think
19 that that's sufficient proof and I certainly don't think that
20 you can look into the minds of the electorate in the case of
21 the constitutional amendment.

22 THE COURT: Can you look at the chronology of events
23 with respect to Hawaii making its decision, Massachusetts in
24 making theirs, DOMA in between, the mini DOMAs coming, the
25 constitutional amendment? Let's extrapolate this to another

1 point that's currently under way.

2 It was I think last year there was an attack on the
3 Second Amendment here in the state of Mississippi. There was a
4 lawsuit filed against the State about the Second Amendment and
5 the right to -- you know, what does this right to bear arms
6 mean? Can we wear it in a public place or whatever it was?

7 What the state has now done in reaction to that was --
8 or somebody -- put it on the constitutional amendment. And I
9 think the governor said, you know, *We just want to make sure*
10 *that everybody understands that you have a constitutional right*
11 *to bear arms despite the fact that the Second Amendment says*
12 *so, and some other article of the state constitution. But I*
13 *assume this new constitution provision that was just voted on*
14 *last week, 88 to 12 percent --*

15 MR. MATHENY: The hunting?

16 THE COURT: The hunting. It was to solidify that *We*
17 *have the right to hunt*, which I presume means we have the right
18 to bear arms. *I don't care how you try to file suit against us*
19 *on anything else.*

20 So if you look at what was going on, you cannot look
21 at any law or anything else. You must look at the context in
22 which it was voted on, the context in which it was submitted to
23 the legislature or the context in which you go gather votes to
24 put it on a referendum and then do it that way.

25 The context of all of these most recent enactments of

1 the mini DOMAs came after Hawaii recognized the right and
2 Massachusetts solidified the right and in between there you had
3 DOMA. And as I asked the lawyer for the State -- excuse me.
4 I'm sorry -- the lawyer for the plaintiffs, as of now I've not
5 heard any elected official or there's not evidence of anybody
6 backing away from the position as the presidents did in DOMA,
7 as the Congress did in DOMA and everybody else.

8 MR. MATHENY: Your Honor, I think that this is an
9 important point, and I'm going to answer your question as best
10 I can. But I think one important point is there's -- well,
11 like many other things or many other issues that are in play
12 here, you have to be careful about blurring things together.

13 And the important point here when you're talking about
14 the context, which certainly there are ways to look at the
15 historical context and the proceeding of what happened and draw
16 some conclusions from that, but the point is you're
17 distinguishing between talking about evidence in terms of the
18 kind of evidence that would come from the witness box over here
19 and looking at it from a standpoint that way and then
20 approaching it in terms of a can you use this model of -- can
21 we rule out everything else but animus and leave that as
22 obviously the sole reason?

23 THE COURT: Why didn't they think -- why didn't the
24 legislature think to do this in 1980 or '85 or '89 or '90 or
25 '95? Because they saw no need for it.

1 MR. MATHENY: That's right.

2 THE COURT: They only saw a need for it after the
3 other states had done it, and they patterned this mini DOMA in
4 the legislature. We'll take the legislature separate from the
5 constitutional thing. Is this legislation modeled after DOMA?

6 MR. MATHENY: Well, I think that certainly it would
7 be -- I don't want to say -- it would be pretty difficult for
8 me to say not because, obviously, the historical context leads
9 to the point. And then *Windsor* itself, it says one of the
10 reasons that Congress when they were looking at the federal
11 government context specifically that they passed it to put
12 their finger on the scale I think is the term that was used.

13 But the point is this, your Honor. The historical
14 context and, you know, was it a response because this was
15 happening in Hawaii or this judge decided it in Massachusetts
16 or when it was -- remember back then an issue of how elected
17 judges are interpreting state constitutions, not the federal
18 constitution, but state constitutions, I think that you still
19 have this issue of can you rule out anything but animus.

20 And counsel had mentioned something, and I'm glad she
21 did because it reminded me of something that I had read
22 somewhere. She was talking about President Clinton's op-ed
23 please. And I know that this doesn't necessarily square with
24 the factual findings that they're asking you to take from
25 *Windsor* despite all the differences and the issues and

1 everything and transpose it on Mississippians, but I had also
2 read about Judge Clinton -- I'm sorry, "Judge Clinton" --
3 President Clinton's thoughts about the law.

4 And one of the explanations that I had heard him
5 say -- I can't remember if it was in his memoirs or an op-ed
6 piece or something, but at that point in time in the historical
7 context that the country was headed toward the potential for a
8 federal constitutional amendment that would address this issue
9 and that he had felt like that this was one way to head it off
10 as compromise as part of the process to prevent that from
11 happening.

12 Certainly, there's other suggestions out there about
13 President Clinton specifically and others about how they
14 changed their viewpoints on things over time and that people
15 see things differently and that things are changing.

16 THE COURT: But if the legislation mimics DOMA, we
17 could assume that the State was at least concerned because --
18 was concerned about all the things that they raised in
19 passing -- passage of DOMA. Can the court make -- can the
20 court make that leap? Prior to DOMA, *Lawrence v. Texas* was
21 passed. *Lawrence v. Texas*, the court ruled on that in 2003.
22 Right? And how should the court look at that?

23 MR. MATHENY: Well, I think that the best I can say is
24 that when you're faithfully applying the test of anything but
25 animus, that you can identify some things that look like animus

1 and you also have to be careful I should say -- when you're
2 talking about animus, you have to be careful about what it is
3 you're actually talking about, because animus has different
4 meanings in different contexts, of course.

5 But when you're talking about the reasons that the law
6 was passed, there's certainly that historical context. But the
7 State's position is you can't rule that -- rule out everything
8 but an animus reason, whether you're defining animus as malice
9 in terms of like legal malice or you're talking about nefarious
10 motive or the motive behind the law and specifically around --
11 in the minds of the electorate which I think, like Judge Sutton
12 had gone into, there's lots of different reasons why people
13 vote for or against something. And I would even say with your
14 Honor's example with the hunting, I didn't vote for it. I
15 shouldn't say it. I didn't vote for it.

16 But you know why I didn't? I didn't vote for it
17 because I don't like how -- I don't like how the -- the way
18 that it was worded on the ballot. I couldn't understand it
19 when I'm looking at it there on the poll. And so I voted
20 against it, even though I have nothing against hunting and have
21 been hunting before. But I'm certainly entitled to have that
22 opinion about it. And I can have that opinion even though I
23 think that -- you know, the basic opinion that it should -- we
24 didn't have to constitutionalize it, as I saw it. But back
25 in --

1 THE COURT: Reconstitutionlize it. Constitutionalize
2 it with a punch.

3 MR. MATHENY: Fair enough, your Honor. I think the
4 bottom line is -- the way to look at it is if you're talking
5 about animus in terms of evidence -- and certainly -- gosh,
6 I've been forgetting to mention it, but when you're looking at
7 something in terms of the preliminary injunctive context and
8 you're talking about evidence, looking at evidence to try to
9 find animus and you're talking about newspaper stories and
10 those sort of things, that's very problematic.

11 But I also -- the State's position is that this
12 anything-but-animus approach doesn't work. And I would -- I
13 would be remiss if I didn't point out that there are a lot of
14 judges, even a lot of judges that have agreed with the result
15 in a lot of these recent cases, but as we cited in our brief,
16 there's plenty of judges at all different levels, Judge Holmes
17 in the Tenth Circuit and others, that have rejected this idea
18 of state definitions and constitutional provisions or statutes
19 can be pinned down to anything but animus in terms of
20 triggering something more than just ordinary rational basis.

21 With respect to the rational basis review, we know
22 what the test is and we know when you're talking in terms of
23 ordinary rational basis review like the State believes should
24 be applied here, we know that you're looking for a legitimate
25 interest. And then the judges look for is there some rational

1 basis or rational relationship between the law and that
2 legitimate state interest.

3 And it's -- as all the opinions have mentioned,
4 rational basis talk about -- it's the most deferential. It's
5 not one where the states have to come in and put on evidence.
6 I think your Honor had pointed out earlier again to counsel
7 about there being a lack of legislative history. Ms. Kaplan
8 may have been surprised by that, but I certainly was when I
9 started working for the State that we really don't have
10 legislative history at all other than what you can find in
11 house journals about who voted for what or if you can get the
12 inside scoop on a committee or something like that. But --

13 THE COURT: The cynics would say there's probably a
14 reason why they choose not to.

15 MR. MATHENY: Well, the main point, your Honor, is
16 when it comes to rational basis review, though, it doesn't
17 matter, because the question is -- and it's not what motivated
18 it at the time or anything of that sort. It's can the court
19 conceive of any rational basis that a -- that a -- a rationale
20 related to legitimate state interest. And I don't how to best
21 formulate it. I have to be honest. I didn't come up with it.
22 Like I said --

23 THE COURT: So what is the State's rational basis for
24 saying that same-sex couples cannot marry, that we will not
25 recognize same-sex couples who are married from other states,

1 and we will further burden same-sex couples and prohibit them
2 from adopting children, children they can provide for, children
3 who they love?

4 All the -- well, all a child wants is to be loved.
5 They don't care by whom or what. All they want is to be
6 nurtured and loved. So what's the State's rationale for say,
7 *We're going to pull out of the pool of eligibles those same-sex*
8 *couples and deny you the right to be able to adopt children?*

9 MR. MATHENY: Well, and as I would say, I think
10 whatever label you put on it, we're talking about the
11 responsible procreation theory or the irresponsible procreation
12 theory as it's referred to sometimes. But when you're talking
13 about the legitimate state interest being stable families and
14 children --

15 THE COURT: Let's take procreation. You allow persons
16 who are imprisoned to be married, and I think the State no
17 longer allows conjugal visits. So if somebody is in prison for
18 a while, they're married, can't procreate. Old people can
19 decide to get married at 75 and 80. Probably very few Abrahams
20 and Sarahs around, or -- you know. So we'll put that to rest,
21 old people.

22 What about the married couple who choose -- chooses
23 not to have children but choose to adopt children? They don't
24 want to have children because they don't want to bring their
25 own child into this world. They say that *There are other*

1 *children out here who need us. Procreation, where does that*
2 *take us with procreation? How legitimate then is procreation?*

3 MR. MATHENY: Well, your Honor -- and I think what all
4 those examples are getting at, you're getting into the issue
5 about the overinclusiveness or underinclusiveness issues about
6 the law, because, obviously, like you said, to -- a man and a
7 woman could get married and choose not to have a child or
8 numerous other kind of examples.

9 When you're getting into those issues when you're
10 talking about irresponsible procreation, you're really getting
11 into changing the scrutiny that you're applying to it because
12 underinclusive and overinclusive in an ordinary-rational-basis
13 sense, the deference that you're giving to the legislature or
14 the legislature and then the Constitution, the line drawing
15 that's there, the rational basis test accounts for imperfect
16 line drawing in that you're going to get some right or --
17 you're going to miss some here, you're going to miss some here,
18 but it all comes down to --

19 THE COURT: Couldn't you ban -- if procreation is
20 really the reason, couldn't you say that persons who are
21 infertile or otherwise cannot produce can get married,
22 opposite-sex people?

23 MR. MATHENY: If you had to more narrowly tailor the
24 law, then I think that that might be an issue. But I think
25 that that results -- that relates to the same -- to the same

1 point. And I would point out -- and I made this point in the
2 brief because it relates to it, but I can't stand here and deny
3 that other federal judges around the country have looked at
4 responsible procreation and said, *Well, that's no good and,*
5 *specifically, that's no good post Windsor,* even though that --
6 and not getting into a debate about what -- getting back into
7 the debate about what *Windsor* means, but every time that
8 they're doing that or nearly every time -- and I have to put
9 that caveat on it because I don't know that I've read every
10 word in every opinion that's come out about this.

11 THE COURT: There's been a lot of opinions.

12 MR. MATHENY: But I can say this, that the
13 overwhelming majority, if not all of them, when they're coming
14 out and rejecting this responsible procreation theory, it's
15 because of using a different lens to view the law and faulting
16 it for the overinclusive and underinclusive examples like your
17 Honor had pointed out.

18 So whether it's the Ninth Circuit adjusting the
19 scrutiny up because of that suspect class or the Tenth Circuit
20 and the fundamental right or the Seventh Circuit and the
21 careful consideration or rational basis plus or however you
22 want to call that, in most all those instances you're talking
23 about ratcheting up the level of scrutiny. So you have to
24 start getting into the issues of how good does the law fit the
25 particular objective.

1 It's the State's position that that's not the way that
2 its law should be viewed and that rational basis should be
3 applied. And it's what Judge Sutton said just last week and
4 Judge Feldman and the federal judges that have seen it post
5 *Windsor*. But it's also important -- I don't think that it's --
6 because this is something else that has boggled me a little bit
7 about these cases, and it's how you know that you have to
8 change the level of scrutiny to be able to strike down these
9 laws.

10 You know because the cases before *Windsor* that are
11 looking at it, that are applying the rational basis test,
12 they're saying, *Well, it's a rational basis*. They had no
13 reason before *Windsor* to apply a higher level of scrutiny. Now
14 an argument has developed when you're talking about time lines
15 of things -- and the legal time line of things and arguments
16 have developed and everybody doesn't agree as to which ones
17 apply or if any apply at all, but these methods of ratcheting
18 up the scrutiny is really what has undone the responsible
19 procreation in the eyes of some of the courts that have decided
20 this issue.

21 I think you also -- in addition to -- and, again, I've
22 labeled it responsible procreation and it's spelled out in our
23 briefs, but you also have to take on these other issues and
24 they have labels as well. But you're talking about tradition,
25 caution, whether you're calling it wait and see, I think it's

1 related -- I don't know how distinct it is, but I think it's
2 also related to the rationale of this is something that should
3 be decided through a democratic process regardless of how
4 successful you might ever think that would be, that it is
5 devoted --

6 THE COURT: I'll pose the wait-and-see question to you
7 about the all deliberate speed. So if we do that -- it was
8 1954 that *Brown* was enacted and in Mississippi it was 1970
9 before my first-grade class was integrated. And it was a
10 first-grade class in my hometown because of the speed at which
11 the State of Mississippi wanted to travel in making sure that
12 *Brown* was effected.

13 So why -- doesn't the court have some responsibility
14 to maybe not wait and see and to -- to not wait and see?
15 Because we may be here in 2031. We may be here in 2131. No,
16 no. I mean, the -- I think it was Judge Posner and some others
17 who said things have happened in light years everywhere else
18 around the country in all this litigation, but what guarantee
19 is there that the political process would work its way through
20 in what I might consider or what the courts might consider to
21 be a timely fashion?

22 MR. MATHENY: There's two things about it. Don't let
23 me forget to get to the second part.

24 THE COURT: Okay.

25 MR. MATHENY: But the first thing that I would say

1 there, your Honor, is one problem with the logic of that attack
2 on the -- if you want to label it "wait and see," it assumes
3 that at the end of the road the wait and see has inevitably got
4 to lead to the recognition of allowing same-sex couples to be
5 married.

6 I think that the point of the wait-and-see
7 rationale -- the point is that it folds into the you're going
8 to let things play out in other courts in other jurisdictions
9 and other electorates and see -- and you're not just looking at
10 do people's minds change about it, but you're also looking at
11 are there reasons that emerge that are reasons to revisit the
12 policy. But it's really hard if you're going to approach it
13 from the mindset of it's got to change, why should they have to
14 wait for that when it's definitely going to change.

15 THE COURT: Well, didn't the antimiscegenation laws
16 change? I'm not sure if Mississippi had it in its
17 constitution, but it had it on its books, I presume. And did
18 they ever -- when did they take it off the books? Certainly,
19 they didn't take it off in 1967. Did they '68 or was it '80 or
20 was it '90 or was it 2000? Same with the anti -- the sodomy
21 laws. Are they still on the book?

22 MR. MATHENY: Your Honor, I'm not sure. But the point
23 is well made. Whether they've technically come off the books
24 or not, unfortunately, it certainly -- the way that you're
25 talking about being on the books or off the books are, in

1 reality, you can't help but -- it's undeniable that it took too
2 long when you're talking about all deliberate speed in the
3 context of *Brown v. Board of Education* and the like, which,
4 again, that's a context that you're talking about heightened
5 scrutiny for -- across the board for many reasons, because a
6 lot of things you're talking about in terms of rights, public
7 education and other things that -- you've got fundamental
8 rights that play there and then you've also got, you know,
9 equal protection and Fourteenth Amendment --

10 THE COURT: And plaintiff contends that you have a
11 fundamental right here, fundamental right to marry, Fourteenth
12 Amendment, see *Loving*. So the plaintiffs contend that these
13 are fundamental rights as well.

14 MR. MATHENY: Your Honor, that's only if you accept
15 the analysis that we're -- like I was talking about earlier
16 about -- and in the brief about the *Glucksberg* test and whether
17 you follow that and that line of reasoning. Certainly, when
18 you're talking about things whether or not something is certain
19 to happen or not, if you ratchet up the level of scrutiny
20 through a fundamental right or some other basis, it's going to
21 produce a different result at the end.

22 THE COURT: But if we keep it at rational basis, the
23 State has a rational basis for saying that same-sex couples
24 cannot get the same benefits, that is -- and I'm looking at
25 this narrowly right now through the sense of providing love and

1 nourishment to a child who loves them. They cannot adopt that
2 child.

3 MR. MATHENY: If -- if it's a question of can the law
4 be faulted because it's overinclusive or underinclusive and
5 that it has effects like that, then that's a problem for the
6 law. But under the rational basis, the lowest level of
7 scrutiny, the deferential level, it -- it doesn't have a
8 problem there. And, like I said, courts looking at it in terms
9 of pure rational basis and pure deference have upheld them.

10 My second point, your Honor -- I didn't want to forget
11 that -- let me see where I had it.

12 THE COURT: No problem.

13 MR. MATHENY: The good questions got me so far off of
14 thinking about that. When I find it, I will point it out.

15 THE COURT: No problem.

16 MR. MATHENY: And I just found it.

17 THE COURT: Okay.

18 MR. MATHENY: The other point is, we can't confuse
19 this wait-and-see idea, the wait-and-see bases for the laws.
20 You have to divorce that from the lens that we're looking at
21 this litigation with in the preliminary injunction context that
22 we have here, because it's one question if you're talking about
23 wait and see in terms of the laboratories of democracy,
24 intentions, how things play out elsewhere. It's another thing
25 when you're talking about in a preliminary injunction context

1 wait and see in terms of, *Hey, we've got two cases up at the*
2 *Fifth Circuit that are fully briefed and they're going to*
3 *argument in a week and a half.*

4 So the wait-and-see aspect on a much smaller scale
5 when we're talking about preliminary injunction, that's
6 something that is important in the context of this case that
7 bears on the equitable factors that have to be considered when
8 you're talking about preliminarily enjoining a state law.
9 Broadly preliminarily enjoining is what they've asked for. I
10 read their requested relief as asking for an injunction meaning
11 that the laws are struck down, meaning that all over the state
12 they have no application going forward.

13 I think that that wait-and-see issue in terms of we
14 do -- in terms of the equitable factors of the injunction, that
15 we need to wait and see how the precedent is going to play out.
16 Is the Supreme Court going to take up the issue now that we
17 have a circuit split? What is the Fifth Circuit going to do
18 about it? And when you factor in that stuff --

19 THE COURT: What if the Supreme Court decides not to
20 take it up, the Sixth Circuit? Because they can choose not to
21 take up a case whether there's a split in the circuits or not.
22 They took a case last week that there was no split in the
23 circuits on how to read the Affordable Care Act thing I
24 believe. So they took that. I mean, so what if they decide
25 not -- what if they deny cert in the Sixth Circuit case?

1 MR. MATHENY: Well, given what we have here, we do
2 know this, we do know that whether the Supreme Court takes up
3 the Sixth Circuit or not, we know that the Fifth Circuit has
4 two cases in front of it, like I said, fully briefed and ready
5 for oral argument, as we all know, in January, and we know that
6 the Fifth Circuit's not going to deny cert on those.

7 It's going to have to decide the issues. And whatever
8 it decides, I have not been able to find any reason that
9 those -- that the Louisiana laws at issue and the Texas laws at
10 issue would be in any way distinguishable from our case here.

11 THE COURT: Should the Fifth Circuit wait until the
12 Mississippi Supreme Court rules on the other case? Because
13 what if the Mississippi Supreme Court -- and I don't know all
14 the facts or issues in that case, but what if they -- I don't
15 know if the parties there raised it in violation of a state
16 constitutional issue, for example. What if the -- should the
17 Fifth Circuit wait until the state supreme court rules?

18 MR. MATHENY: It's a good question, and I think it
19 relates back to the orderly process concept or theme that I've
20 been talking about is we know -- and I know this because it's
21 come up with the Mississippi Supreme Court case. Whatever the
22 Mississippi Supreme Court says on -- on an issue of federal law
23 has no precedential effect on what you would decide, your
24 Honor, or what the Fifth Circuit would decide and certainly not
25 what the United States Supreme Court would decide on an issue.

1 And that's a two-way street in the sense that the
2 Mississippi Supreme Court can look at -- because of how the
3 system works, they can look at the law and come to a
4 conclusion. And not only is that not binding on you, but --
5 and, again, you have to be -- when you're talking about the
6 process, of course, your injunction would take precedence when
7 we're talking about supremacy clause type issues; but in terms
8 of an opinion from any federal court other than the Supreme
9 Court, the Mississippi Supreme Court's not bound by that in
10 terms of they have to follow that precedent.

11 It raises another -- and because of the context here
12 that -- like I said, that's something I've had to look into
13 myself when you're talking about -- when you're talking about
14 dealing with that separate case that's going on. And I would
15 note, I think that counsel opposite e-mailed you our briefs in
16 that case. And I don't know if you've looked at them and I
17 don't know -- I don't know how much you would want to or at
18 all, but it is a slightly different issue, as your Honor had
19 pointed out. But it really relates to an issue that I wanted
20 to make because you had raised it earlier.

21 The issue in the other case is not whether or not the
22 couple could get married, but it's a divorce case. So it is
23 more in line with the issue about recognizing marriage as
24 solemnized in other states. And it was because this couple had
25 gone -- lived in Mississippi and gone to California and gotten

1 married over a weekend and come back and now they wanted to get
2 a divorce. So it tracks more along the lines of -- and, in
3 fact, they did make the argument that -- that the plaintiffs
4 are not making here about the full faith and credit issues that
5 come up and of the sort.

6 But I think that the attorney that's involved in that
7 case and the equal protection and due process challenge to the
8 laws is teed up, because like many of these other cases that
9 we've seen, there was a point that the case got to where they
10 said, *Well, if you want this kind of relief, you have to strike*
11 *down the law to be able to get there. You have to have the*
12 *Mississippi chancery court recognize this marriage, which the*
13 *law says it can't do, in order to be able to undo the divorce*
14 *(sic) by divorce.*

15 Your Honor, I -- the last points that I wanted to make
16 when I was thinking about the decision tree, and, again, it
17 relates to -- it relates to orderly process, and it's important
18 because of the preliminary injunction. Mr. Barnes is going to
19 argue -- and I know we -- the State had filed a motion for
20 stay, and the point of that being is that having the benefit of
21 seeing what has gone on in other cases, we know that if -- if
22 your Honor sees it and rules for the State, then -- because of
23 the way the appeal statutes work, then the plaintiffs would be
24 entitled to appeal. If your Honor rules against the State,
25 then the State would have the right of appeal and there would

1 be an issue about staying the injunctive -- the preliminary
2 injunctive relief.

3 It's a little bit different test when you're talking
4 about looking at it in terms of a stay versus when you're
5 looking at it through the lens of *Should I grant a preliminary*
6 *injunction* and looking at the equity -- equity factors there.
7 So I wanted to make sure to point out that difference and point
8 out that Mr. Barnes is going to discuss those issues with you.

9 But I did want to point out, as we said in our brief,
10 we disagree about the three equitable factors and whether or
11 not that there's been a sufficient showing when -- in terms
12 of -- you're talking about a preliminary injunction, you're
13 talking about gigantic relief. It's essentially class relief
14 on a three-week string that they've asked for. It's not
15 limited to just the plaintiffs that are here, what they've
16 asked for.

17 It's not limited to some discrete issue like some of
18 the other cases where preliminary injunctive relief has been --
19 has come out. It's not -- there's not issues about do we have
20 someone listed on a death certificate or a birth certificate or
21 something that -- where there's more immediacy from the State's
22 point of view. It's an important legal point that I have to
23 make.

24 There are, obviously, a lot of other cases out there.
25 There's very few that have gone off on preliminary injunction.

1 Most involved individual circumstances, like I was saying.
2 Others limited their relief, like, for example, in Tennessee
3 where the judge said *I'm going to -- I'm going -- I find the*
4 *equitable factors weigh in the plaintiffs' favor and I'm going*
5 *to order relief to these plaintiffs and these plaintiffs only.*
6 But then, of course -- I mean, with Tennessee, that involved
7 injunctive relief and it ended up getting reversed.

8 THE COURT: What about the slew of cases that went to
9 the Supreme Court, Idaho I believe, Alaska, I think there's
10 something in Kansas today? I don't know what Justice Sotomayor
11 has said about it. But what about all these other cases that
12 have gone and asked the Supreme Court for a stay after -- and
13 maybe that's something we'll talk about in Mr. Barnes'
14 argument, but they -- they sort of -- I think Justice Kennedy a
15 couple of times granted a stay for a day, a weekend or a week,
16 but lifted the stay in Utah I believe and some other states?

17 MR. MATHENY: It's an important point and I know it --
18 it gets right back into the orderly process issue and about how
19 courts work and everything. Those examples that you're talking
20 about there, I'll go in reserve order, like the Kansas case.
21 The issue is there, well, the Tenth Circuit had already decided
22 the issues. Now, there was some -- I think that the -- the
23 issue with the Kansas deal -- I mean with Justice Sotomayor
24 recently, Kansas had some defenses that they were raising that
25 were more procedural or, you know, legal defenses separate and

1 apart from the merits of the cause. I think specifically there
2 was an abstention issue and maybe some standing or others in
3 Kansas.

4 The Ninth Circuit, obviously, that's different from
5 where -- not just because it's California and such, but what
6 I'm saying is the Ninth Circuit going to the Supreme Court is
7 different from district court going to the Fifth Circuit and --

8 THE COURT: Okay.

9 MR. MATHENY: -- and having unsettled law. So I
10 apologize for a muddled recount of how the court -- how the
11 appeals process works and everything. But one last point I'd
12 make on it, your Honor, and I was glad that counsel opposite
13 had sent you a copy of the West Virginia order that had come
14 out. I'm not positive about the timing, but I think it was
15 after the Sixth Circuit. No, I'm positive it was after the
16 Sixth Circuit because they're talking about it.

17 THE COURT: Right.

18 MR. MATHENY: But I'm glad counsel sent you that order
19 because there was some important points that I wanted to
20 highlight in it. Number one is that case was a lot like this
21 case in several respects, number one being that it was a
22 West Virginia district court and the case had been filed while
23 the -- specifically, the Virginia cases were much further along
24 up at the Fourth Circuit; and the West Virginia court stayed
25 the case entirely, not just not going to grant any kind of

1 injunction, but stayed the case entirely to see what would
2 happen with the *Bostic* case.

3 So while they -- there was some rejection of the Sixth
4 Circuit line of reasoning for similar reasons because after it
5 stayed the case and the Fourth Circuit decided *Bostic*, there
6 was nothing left for the West Virginia court to do essentially
7 other than address the outstanding motions. And it said, *The*
8 *holding in Bostic controls this case*. So in the context of
9 that kind of case, there was no emergency, no immediacy to run
10 out and proceed there when there were other proceedings that
11 were going to be binding on --

12 THE COURT: Is there any emergency that the State
13 would recognize? Suppose that the plaintiffs were a couple,
14 one of whom was on his deathbed. Would the State say that
15 we -- you are to be -- you are to move forward, if you think
16 that they will be irreparably harmed because one of the spouses
17 will die before this is decided by the Fifth Circuit and they
18 want to be married now in Mississippi?

19 MR. MATHENY: That might be a circumstance, but I
20 think what your example -- the important point about it is
21 is -- and particularly when you're talking about preliminary
22 injunctive relief, in these other cases where that has come up,
23 they went through the process that applies and there was proof
24 about those things.

25 In this case when we're talking about broad relief, I

1 don't think that you can do it. I don't think you can ignore
2 that there's not any evidence before the court that there's
3 some sort of situation out there like those described that are
4 the basis for wanting an injunction, a statewide applicable
5 injunction to the state laws.

6 One other point about the West Virginia case that's
7 buried in there, but it's significant I think, is even when --
8 even -- even in spite of the Fourth Circuit's decision, the
9 judge in West Virginia sua sponte stayed the case until all the
10 appeals were exhausted to be absolutely sure that they got the
11 decision right.

12 And unless your Honor has some other questions, that
13 would bring me to my closing point which is in talking about
14 the orderly process and the importance of that and then the
15 lens of looking at this in terms of preliminary injunctive
16 relief, you want to let the process play out and you want to
17 follow the process specifically, because one thing that we can
18 all agree on, everybody in this room, whatever the legal result
19 is we want to get it exactly right and we want it to be exactly
20 right. We don't want to -- for the law to be on and then off
21 and then on and then off again.

22 That's how you sum up the way I believe the State
23 looks at the equity factors and the importance of those in
24 terms of their relation to the motion for preliminary
25 injunction. And as I had said before, I'll let Mr. Barnes

1 address the discrete issue of -- or the similar but different
2 issue about what to do -- if there is an injunction, what to do
3 about preserving the appellate rights to seek a stay.

4 THE COURT: Okay. Thank you, Mr. Matheny. Could
5 counsel approach, please.

6 (BENCH CONFERENCE)

7 THE COURT: The intentions were to go back to
8 Ms. Kaplan and then move into the stay, but I think my court
9 reporter will need a break for lunch and probably y'all too.
10 Are we prepared to go --

11 MS. KAPLAN: I'm prepared to go on on reply, if that's
12 easier for your Honor, whatever you choose.

13 THE COURT: Yeah. And then that will create a good
14 amount of segue or separation between, but I do think we're
15 going to take about an hour lunch break after Ms. Kaplan
16 finishes her -- if it's better to do it -- to break now, I can
17 do that as well.

18 MS. KAPLAN: I'm happy to do the reply now. And, as
19 your Honor knows, I'm fast. So I'll go quickly.

20 THE COURT: And then we'll -- I'll announce on the
21 record what time we'll come back and all.

22 (BENCH CONFERENCE CONCLUDED)

23 MS. KAPLAN: Your Honor, I'm going to respond briefly
24 to the points made by my friend for the State. I'm going to
25 take, if it's okay with your Honor, the arguments in reverse

1 order the way they were made. So let me start with the
2 argument about -- the last argument about preliminary
3 injunction and orderly -- orderly process.

4 I think the fundamental thing to think about here is
5 that the parties have agreed with respect to this motion that
6 there is no need for evidentiary presentations, no need for
7 proof and that the issues can be decided on the law. As a
8 practical matter then, the only distinction between a
9 preliminary injunction and a ruling later, since there's -- no
10 one's talking about putting on any evidence, is the timing of
11 the briefing, because they will both be briefing -- we're
12 talking about briefing on legal issues.

13 Here while I certainly concede that the briefing
14 schedule was expedited, the State did an extremely good job in
15 filing a lengthy brief on the merits within the page limits, of
16 course, another brief for the Governor on the merits and a
17 brief on a stay. So as a practical matter, I don't really see
18 a distinction between the procedure that we're following here
19 on a preliminary injunction -- a preliminary injunction and the
20 procedure that one would follow if an injunction -- preliminary
21 injunction had not been sought other than the fact that the
22 briefing on the legal issues happened a little bit more quickly
23 than ordinarily.

24 With respect to the wait-and-see approach, it's my
25 understanding that that approach is one that has to do with the

1 democratic process. In other words, the argument is that
2 courts shouldn't rule because they should let the legislatures
3 and legislators decide. I'd never heard the argument prior to
4 today articulated that the wait-and-see approach extends to
5 courts so that the court should wait and see while another
6 court decides something.

7 And the truth of the matter is, your Honor, I can't
8 think of any principled way for that form of wait and see to be
9 applied. Who's to decide which court gets to decide? A court
10 in Mississippi? A court in Louisiana? A court in Texas? So I
11 don't think that argument makes a lot of sense when we're
12 speaking about courts.

13 THE COURT: How about the Fifth Circuit ruling on --
14 and let's assume, for example, that Texas law is the same as it
15 is here and the Louisiana law is the same as it is here and
16 they're represented by capable counsel and the argument's due
17 to be argued on January the 5th. Should we wait until the
18 Fifth Circuit -- and that may be something we'll get into in
19 the next prong of the argument, but should -- is that something
20 the court should wait on?

21 MS. KAPLAN: I think -- obviously, the Fifth Circuit
22 will have the opportunity to make the ultimate decision within
23 the circuit. But I think there's only an advantage to the
24 Sixth Circuit (sic) having the benefit of your Honor's opinion
25 before it when it makes that decision. That way it has the

1 advantage --

2 THE COURT: The Fifth Circuit.

3 MS. KAPLAN: Excuse me. The Fifth Circuit has the
4 benefit of decisions from judges in all three states that are
5 affected. I think that's appropriate here. And I will point
6 out that that's exactly what happened in the Sixth Circuit.
7 The Sixth Circuit, unlike what my counsel mentioned, heard
8 appeals from Michigan, Ohio, Kentucky and Tennessee. So some
9 courts have stayed, but most courts have actually decided in
10 all the states and those decisions have gone up.

11 And, again, your Honor, I'm a New Yorker. So I don't
12 want to presume to say anything, but I assume Mississippi has
13 its own interests, its own values and certainly is a different
14 state, though they're close by, than Louisiana or Texas.

15 And your Honor brought up an issue with respect to
16 this wait-and-see issue in terms of all deliberate speed in the
17 wake of *Brown v. Board* and you asked counsel a very good
18 question, which is, *Look, who's to know when things will*
19 *happen? How do we know when the legislature will act? And how*
20 *can I have any confidence that that will happen?* And you
21 actually raised the question of the sodomy statute.

22 Ironically, the very case -- I think I mentioned this
23 before -- that the State offers here, which is Exhibit 2 to
24 Governor and Attorney General's response in Opposition to
25 Plaintiffs' Motion for Preliminary Injunction -- and that's the

1 *Walker v. Mississippi* case, the magistrate's decision and the
2 district court's decision. As I mentioned, that prisoner had
3 originally moved to strike Mississippi's sodomy statute and
4 that -- it says in the decision that that court dismissed that
5 motion.

6 Now, what's truly interesting about that is that was
7 in 2006, three years after *Lawrence*. So the court should have
8 known at that point that the statute was no longer good law.
9 Mississippi legislators should have done something. It was
10 still on the books. And even the court dismissed an argument
11 that it should be struck as unconstitutional.

12 There was a lot discussion about overinclusive and
13 underinclusive and whether a court applying rational basis can
14 ask itself the question whether a statute is so radically
15 either overinclusive -- here the statutes are both -- and
16 underinclusive that it doesn't satisfy rational basis. And the
17 argument was made that that necessarily is an analysis that can
18 only be done under heightened scrutiny. That's not the case.

19 In two cases not involving gay people, *Cleburne* and
20 *Moreno*, Supreme Court cases, the Supreme Court did precisely
21 that kind of analysis and said it was applying rational basis
22 and held the statutes to be unconstitutional. In *Romer* in
23 1996, again, the Supreme Court did precisely that analysis,
24 said it was doing rational basis review and said that the
25 Colorado amendment at issue in *Romer* was broadly both

1 overinclusive and underinclusive and, therefore, it was
2 unconstitutional under rational basis. Moreover, I don't even
3 think that really matters because you still, as counsel
4 conceded, have to have a rational connection, either a good
5 reason and a rational connection between the legitimate reason
6 and the law.

7 Let me talk about some of the rational basis cases
8 that people on the other side like to rely on here. *Beach*
9 *Communications* is a case about FCC regs. It's an opinion by
10 Justice Thomas. And in that case Justice Thomas goes on to
11 cite a whole bunch of good reasons, a lot more than are cited
12 here, none of which are really arguable good reasons, for why
13 FCC regs about cable companies and how they operate was totally
14 rational.

15 In *Johnson*, the case was about the government giving
16 certain kinds of benefits to veterans who had actually served
17 in the military as opposed to conscientious objectors. And,
18 there again, the Supreme Court said it makes sense to give
19 educational benefits to someone who actually took the risk of
20 serving and risk their life for the country as opposed to
21 someone who's a conscientious objector. Again, a very strong
22 reason, a very rational reason that's connected to the
23 objective, the kind of reason that's completely lacking here.

24 So the counsel on the other side also asked what has
25 changed. And he's right about that. The fact of the matter is

1 I've been doing this litigation for a long time. The same
2 arguments that were made in the early 2000's are being made
3 today, and the decisions are coming out the other way. I think
4 the answer to that question is not the law, frankly, your
5 Honor.

6 I think the answer to that question is that -- as
7 Justice Kennedy said in *Lawrence*, is that times can blind us to
8 certain truths and that people had not -- did not have the
9 understanding that they have today that gay people are no
10 different than anyone else. And if there was any question
11 about that, I think what's really moved both courts and the
12 country on that is the Supreme Court's decision in *Windsor* that
13 basically made it clear time and time again that gay people
14 have the same dignity as everyone else and that that dignity
15 needs to be respected equally under the law.

16 Let me talk a little bit about animus. I think your
17 Honor is getting at it from exactly the right place, which is
18 the fundamental point about animus in this context is that the
19 Supreme Court of the United States found there to be animus in
20 the *Windsor* case. There's no question about that. And I think
21 that fatally undercuts counsel's arguments that in order to
22 find animus you have to conclude that it was -- there was no
23 other objective, no other motivation. I think counsel said
24 anything but animus.

25 That's not what Justice Kennedy did in *Windsor*. He

1 did not make a conclusion that every single legislator who
2 voted for DOMA had impermissible animus in his heart or mind.
3 As I said before, he just looked at the text of the statute, as
4 your Honor has pointed out, and the context and the statement
5 in the House report.

6 Here in the context of Mississippi I think the
7 constitutional amendment of this argument is particularly
8 strong because, after all, Mississippi had a statute on its
9 books already from 1997 prohibiting marriage between gay
10 people. And again with all respect, I think it's realistic to
11 assume that there was really no way on God's green earth in
12 2004 that the State of Mississippi was going to somehow decide
13 legislatively to decide to allow gay people to marry.

14 So, therefore, the only reason for putting a
15 constitutional amendment in addition to the decision that came
16 out of Massachusetts in *Goodridge* is some sense that we've got
17 to make it really, really, really, really sure that gay people
18 are going to be treated differently. And that's the kind of
19 animus that Justice Kennedy was talking about in *Windsor*.

20 Let me talk briefly, very briefly, about Justice
21 Sutton's opinion in the Sixth Circuit, only on one point. I,
22 frankly, do not know how one can reconcile Justice Sutton's
23 approval, apparently, of the *Loving v. Virginia* case with his
24 view that one needs to do an original interpretation of the
25 Fourteenth Amendment, because if your Honor -- as your Honor

1 had pointed out, when the people were ratifying the Fourteenth
2 Amendment, it was absolutely clear that black people couldn't
3 marry white people. And so if that view of the Fourteenth
4 Amendment is correct, then *Loving* was no longer good -- was
5 not -- was incorrectly decided. And that, again, shows why
6 that interpretation I think is incorrect.

7 In terms of the fundamental right analysis, and I
8 think -- and there was a lot of talk about *Washington v.*
9 *Glucksberg*. I think what's clear from the court's decisions is
10 that the fundamental right to be recognized has to be based on
11 tradition. So here there's obviously a tradition --
12 fundamental tradition of people having -- getting married in
13 our society. That's always been the case, or at least for a
14 very long time in Western society.

15 But I think what the Supreme Court has been very clear
16 about is that once that fundamental right based on tradition is
17 recognized, what's not based on tradition is who gets to
18 exercise it. So again going to *Loving*, in *Loving* there was a
19 longstanding tradition that black people, or African-American
20 people, could not marry white people. The races couldn't mix.
21 But the Supreme Court recognized there's a fundamental right to
22 marry and said that you can't limit that fundamental right to
23 groups who want to exercise it. And the same thing applies to
24 gay people, of course.

25 On the heightened scrutiny issue and what your Honor

1 can or cannot do in that respect, I heard the State to concede
2 that *Baker v. Wade* is no longer good law. I need to correct
3 myself on that. The statute at issue in *Baker v. Wade* was
4 actually a Texas statute. It was the same statute that was
5 overruled in *Lawrence*.

6 I don't think that the fact that the Supreme Court has
7 not decided whether or not gay people get heightened scrutiny
8 binds this court. After all, the Sixth Circuit actually didn't
9 reach this issue. Judge Sutton made no ruling on whether gay
10 people get heightened scrutiny. He said he was bound by a
11 post-*Lawrence* Sixth Circuit decision, which is different than
12 the court here. But he made no analysis of the factors.

13 And if the Supreme Court's nondecision, essentially,
14 not to decide the question of whether gay people get heightened
15 scrutiny was binding, then the President never would have
16 changed his opinion on DOMA. What changed the Department of
17 Justice's view on DOMA is the fact that they concluded that gay
18 people get heightened scrutiny and that that was an open issue
19 both in the Second Circuit and in the Supreme Court.

20 And counsel's correct that the -- that post *Baker v.*
21 *Wade* cases in the Fifth Circuit basically just say the Supreme
22 Court hasn't decided this. But, again, that's not a reason not
23 to decide it. It is not a binding determination, your Honor.
24 It just means it's an open question.

25 Let me talk a little bit about -- there's a lot of

1 *Bakers* here -- *Baker v. Nelson*. This is what Judge Jacobs
2 wrote in the *Windsor* case about *Baker v. Nelson*. "In the 40
3 years after *Baker* there have been manifold changes to the
4 Supreme Court's equal protection jurisprudence." And he cites
5 *Frontiero, Boren, U.S. v. Virginia, Romer* and *Lawrence*. As
6 your Honor pointed out, that decision was a decision that was
7 affirmed by the Supreme Court. And not only was that not
8 mentioned -- that argument not mentioned by the majority, it
9 wasn't even mentioned by any of the dissenters.

10 While I agree with your Honor that a court has to be
11 very careful about relying on cert denials, the fact of the
12 matter is is that four justices of the Supreme Court thought
13 that *Baker v. Nelson* was binding. One -- and it was clear and
14 obvious that there was no issue to be litigated anymore. One
15 would presume that four justices would have voted to take cert
16 and clarify that correction in October of this year.

17 With respect to the *Hatten v. Rains* case cited by my
18 adversary, that was that New York case that was dismissed
19 summarily by SCOTUS the same year as the Texas case was before
20 the Fifth Circuit. As you pointed out, it was a claim of age
21 discrimination with respect to judges. But in that case there
22 was no question of subsequent doctrinal developments. There
23 couldn't have been and there were none with respect to the
24 issues that were presented within that, you know, very short
25 period. I'm not even sure there have been any since.

1 And, indeed, talking about another important issue in
2 the case, age does not get heightened scrutiny for a very good
3 reason, or at least a reason that now I think is very good --
4 maybe when I get older, I'll disagree -- and that's because
5 under the second factor of heightened scrutiny, people assume
6 that as you get older it actually does have some ability (sic)
7 to your ability to contribute to society. And I think we heard
8 from the State that they concede that being gay does not.

9 Finally, my adversary talked about -- I think his
10 expression was that *Windsor* has everything in it for everyone.
11 In one respect I agree with him. People can find something --
12 a lot of people can find something that they like in *Windsor*.
13 That's actually what lawyers do. We get trained and paid to
14 find things that we like in Supreme Court decisions. So that
15 is certainly true that lawyers have been able to find something
16 for everyone in *Windsor*. But the difference is judges.

17 With respect to the judges post *Windsor* who are not
18 paid and are not -- don't have clients and are supposed to be
19 deciding things based on justice and the law, the vast majority
20 of judges have agreed that *Windsor* is not a decision that says
21 that states can do whatever they want with respect to who can
22 marry and that what *Windsor* stands for is the proposition that
23 gay people have the same dignity and the same equality as
24 everyone else.

25 And, as I said before, once the court recognizes that,

1 as we've heard today, it's very, very hard, if not impossible,
2 to come up with any decent reason for why there should be
3 discrimination in marriage. Thank you, your Honor.

4 THE COURT: Let me ask you this. Since this *Windsor*
5 can be seen by different people for different reasons and ways,
6 *Windsor* speaks in enhancing the dignity of a person and not
7 demeaning and sort of -- New York had attempted to do that.
8 And *Windsor* spoke positively about expanding the rights.

9 If I want to see that from the viewpoint of the court
10 suggesting to the states maybe you ought not to diminish these
11 rights in the way that the Congress attempted to do in DOMA,
12 could -- since anybody can see any case in any way, is that an
13 arguable way to sort of read *Windsor*?

14 MS. KAPLAN: Yeah. I mean, I think what Justice King
15 is talking about and is certainly true is that in New York in
16 *Windsor* -- you're right. The New York Legislature enacted
17 equality in marriage for gay people. And states always have
18 the right to expand the rights of minorities. There's no
19 question about that. What states don't have the right to do is
20 have a law that violates in some respect the Constitution. And
21 that's what we're talking about here. I completely agree with
22 that, your Honor.

23 THE COURT: All right. Thank you. This is an
24 extremely important case to everyone. We're at the point where
25 the court is going to take a lunch break. We don't expect this

1 to go all day, but we do -- we'll start back up at 1:45. And
2 is that sufficient time for counsel? It's 12:32 now. Is that
3 sufficient time for counsel?

4 MR. MATHENY: Yes, your Honor.

5 THE COURT: Okay. And we'll start back up then.
6 Thank you so much.

7 (NOON RECESS)

8 THE COURT: You may be seated. I hope everyone
9 enjoyed their lunch, or at least their break. I think now it's
10 appropriate to turn to the State for the second half of the
11 argument. Are you ready to proceed?

12 MR. BARNES: Yes, your Honor. Paul Barnes with the
13 State. May it please the court. The factors that apply that
14 the court should consider in determining whether or not to
15 apply a stay are well known: Strong showing that the applicant
16 is likely to succeed on the merits; where the applicant will be
17 harmed in the absence of a stay; where the issuance of a stay
18 will substantially injure other parties interested in the
19 proceeding; and where the public interest lies.

20 There's no reason to belabor the merits issues here
21 today, obviously, although we would like to point out that it's
22 a slightly different standard that applies when the court is
23 considering the injunction itself on the merits and when the
24 court is deciding whether to issue a stay.

25 When the equities heavily weigh in favor of the

1 applicant, the applicant need not make a strong showing or show
2 a probability of success on the merits, but need only show a
3 substantial showing that -- and a serious legal question. We
4 think that the State prevails on the stay issue here under
5 either standard.

6 They took us to task a little bit in their response to
7 the motion saying that we were admitting defeat by asking for a
8 stay before an injunction had been granted. That's not the
9 case. We feel strongly in the strength of our arguments on the
10 merits. However, in light of events that have occurred in
11 other states, it would have been foolhardy not to take into
12 account the possibility that the State might not be successful.

13 So we filed this motion specifically to avoid a
14 sequence of events like that which occurred in Utah. Utah is
15 the best example. And it was complete chaos. In Utah the
16 district court entered a preliminary injunction striking down
17 the State's traditional marriage laws, but the State had not
18 requested a stay at that time in the event the court entered
19 the injunction.

20 The court -- the State then moved for a stay. Three
21 days later the district court denied the stay. Immediately
22 same-sex couples began going to the appropriate clerk's
23 office -- offices. Apparently, over 1100 licenses were issued;
24 over 1,000 marriages took place. Meanwhile, I believe the
25 application for a stay in the Tenth Circuit was denied; but,

1 ultimately, the State applied for a stay to the Supreme Court
2 which granted a stay several weeks later.

3 At that point is when the real mess began. The State
4 took the position that the marriages which had occurred in the
5 interim were on hold and could not be recognized or should not
6 be recognized until the merits were resolved by the appellate
7 courts. In Utah you had different public officials both on the
8 state and local levels taking different positions, both
9 privately and publicly, about the meaning and impact of the
10 injunction, the impact of the stay and the validity of the
11 marriages.

12 Ultimately, there was -- for example, you even had a
13 state court recognizing the validity of marriages in an
14 adoption case, and the Utah state courts issued a show cause
15 order against officials of the state agency who would not
16 recognize validity of the marriage. And the state Supreme
17 Court then had to step in and stay the result of that order.
18 So it was a real mess. And, again, those kinds of things would
19 be likely to occur if the court should enter an injunction here
20 and not order a stay, and we'd like to avoid it.

21 Ultimately, the same-sex -- some of the same-sex
22 couples who had been married while the preliminary injunction
23 was in effect but before the stay went into effect had to file
24 a separate lawsuit in federal district court to get an
25 injunction to require the State of Utah to recognize their

1 marriages as valid.

2 The court ruled in their favor through what I consider
3 some fairly sophisticated legal legerdemain, but -- regarding
4 that activity. But the end result was that the state then
5 appealed that to the Tenth Circuit. That was still pending
6 when the Supreme Court denied cert in *Kitchen*. So at that
7 point you had a Tenth Circuit precedent saying that state laws
8 barring same-sex marriage were unconstitutional, cert had been
9 denied on the Tenth Circuit ruling, and at that point the state
10 stops trying to defend the laws -- stopped trying to the
11 challenge the validity of the marriages which had occurred in
12 the interim and withdrew its appeal.

13 We have every reason to believe that if the court
14 enters an injunction, as soon as possible same-sex couples
15 would begin going to state courthouses and circuit clerk's
16 offices to seek marriage licenses. We -- I don't think it's a
17 surprise to anyone that we will appeal if the State is
18 unsuccessful here, and we would ask for stay relief from the
19 Fifth Circuit. I think if we were successful here on the
20 merits, I doubt that the plaintiffs wouldn't also appeal.

21 So the issue is should this court go ahead and grant a
22 stay to hold the status quo to prevent irreparable injury to
23 the State, to the litigants and injury to the public
24 interest --

25 THE COURT: How will the State be irreparably injured,

1 though?

2 MR. BARNES: Well, a number of ways, your Honor.
3 First you've got the practical difficulties with dealing with
4 an immediate and sudden change in law. On the one hand, the
5 plaintiffs say denying same-sex couples the benefits of
6 marriage is a wide-ranging scheme of discrimination that
7 involves numerous different areas of law such as taxation,
8 probate, health, education, et cetera. On the other hand, they
9 make the assertion in their complaint that the State of
10 Mississippi will incur little to no burden in allowing gay
11 couples to marry and recognizing valid marriages of gay couples
12 from other states.

13 Well, that has not been my personal experience in
14 state government in that changing some of those administrative
15 schemes does take at least some minimum amount of time.
16 Moreover --

17 THE COURT: How much? Two weeks? Ten days? A month?

18 MR. BARNES: You know, your Honor, honestly, I'm not
19 going to tell you I'm an expert on every area of administrative
20 law, but I would think that at a minimum a couple of weeks
21 would give the clerks and the other personnel time to be
22 prepared to begin dealing with the issues that would result.

23 THE COURT: I've got some questions for the clerk's
24 office as far as what it takes for them. It seems to me
25 that -- I hadn't gone through that process in about 25 years,

1 but I think it's just a matter of filling out an application.

2 MR. BARNES: It's simpler now. And if we were just
3 talking about the marriage licenses, that would be one issue.
4 But, again, as soon as the marriage license is issued, as
5 they -- they've only brought in the Hinds County Circuit Clerk
6 as a party; but as they've argued, you know, a marriage license
7 issued by any county in Mississippi is valid throughout the
8 state. So that means that every one of the circuit clerks in
9 every one of 82 counties would have to be prepared to issue
10 same-sex marriage licenses.

11 THE COURT: And how much -- that question is going to
12 be asked of the circuit clerk's attorney.

13 MR. BARNES: Yes, sir.

14 THE COURT: But what's the difference between -- if
15 1200 opposite-sex couples merge onto the Hinds County Clerk's
16 Office -- we won't use Hinds County because he's going to be
17 prepared to answer that question -- Oktibbeha County --

18 MR. BARNES: Well, your Honor --

19 THE COURT: -- what happens?

20 MR. BARNES: Well, I think, obviously, in some
21 counties, perhaps in smaller counties, it might take longer to
22 get one application processed than it would to get 100 handled
23 in a larger county. So I think there would be a range of time.
24 I think you'd really have to ask -- as far as the licenses are
25 concerned, you'd have to ask the clerks in each county.

1 I do agree that the process is easier than it was when
2 I got married. You no longer have to have a blood test.
3 There's no longer a three-day waiting period, et cetera. It's
4 my understanding that both parties go and apply. However,
5 they're also asking the State -- this court to enter an
6 injunction immediately requiring the State to recognize the
7 validity of same-sex marriages, not only same-sex marriages
8 performed in the state, but same-sex marriages which have been
9 performed in other states.

10 Now, the cogs that turn -- that have to turn to adjust
11 things like taxation schemes and adoption and education, which
12 are complex administrative regulatory schemes, that would take
13 more time. Obviously --

14 THE COURT: But the adoption process is a legal
15 process anyway where somebody has to formally go into court and
16 file a petition and that petition is answered. There is a
17 hearing before a chancellor. And if the chancellor knows that
18 it's a same-sex couple trying to adopt a child, then --

19 MR. BARNES: That's true, your Honor, and perhaps
20 adoption may not be the best example. But taxation is a good
21 one where we all know that that is a -- that's a very intricate
22 system. And also in their complaint the plaintiffs didn't
23 exactly go into detail as to exactly how same-sex couples are
24 disadvantaged --

25 THE COURT: Well, let's talk about taxation.

1 Generally, people file taxes once a year.

2 MR. BARNES: That's right.

3 THE COURT: I mean, generally. I mean, they wait
4 until April 15th, thereabouts, when they file. So -- and they
5 file either jointly or separately or however they file. And it
6 is processed through the tax commission's office in that
7 manner, right, once they make the affirmative showing of how
8 they are filing? Right?

9 MR. BARNES: Yes, your Honor. Again, but it's my
10 understanding that -- again, I -- I'm not going to state this
11 for a fact, but I believe that proprietary software is involved
12 and it's not just as simple as flipping a switch. They do have
13 to go in to modify the way the system was going to handle those
14 tax returns. And it is also true that you can amend an
15 individual's tax return in Mississippi for up to three years.

16 So particularly with regards to irreparable and
17 immediate harm which might occur to plaintiffs on the taxation
18 issue, as you mentioned, they wouldn't have to file tax returns
19 for this year until the spring. And then also if their rights
20 were vindicated, I mean, this court or on appeal or ultimately
21 the U.S. Supreme Court, they could amend their tax returns.

22 THE COURT: But people can always amend their tax
23 return.

24 MR. BARNES: That's right, your Honor, which is why
25 it's not immediate and irreparable injury to the plaintiffs for

1 this court to deny (sic) a stay.

2 THE COURT: Well, why should the State be given the
3 benefit of a stay just because they have to go through some
4 regulatory rigmarole with respect to taxes, with respect to
5 adoptions, with --

6 MR. BARNES: I'm glad you asked, your Honor, because
7 it's not just that. First of all, the Fifth Circuit has
8 accepted the premise on several occasions and very strongly
9 accepted the premise that when a state is prevented from
10 enforcing its laws, the State necessarily suffers irreparable
11 harm.

12 Plaintiffs have argued and I'm sure will argue again
13 that a moment's delay in the exercise of a civil right is
14 automatically irreparable harm. We are not going to suggest
15 that it would be no harm to litigants. I think that would
16 be -- we couldn't justify that statement.

17 However, when you're talking about the cases that deal
18 with that type of irreparable harm generally are dealing with
19 well-established and fundamental rights that have been long
20 recognized. That is not the case here where even though
21 they're asking the court to find a fundamental right,
22 nonetheless, none of us would I think disagree that they are
23 asking the court to change the status quo. So we don't think
24 those cases are as appropriate as they might be in another
25 context.

1 Second and because the situation in Utah is relevant
2 to all three of the remaining factors, the public interest in
3 the one sense, in the sense of enforcement of the State's laws,
4 the Fifth Circuit has said that the public interest merges with
5 that of the State. Also the public interest -- the State --
6 the public has a strong public interest in the stability of
7 marriage laws.

8 And I think we can all agree that whether we're
9 talking about marriage laws in general or same-sex marriage,
10 the State and the public interests would be best served by
11 stability of marriage laws. The public interest would not be
12 served by an on-again, off-again situation like happened in
13 Utah. Now, in their response the --

14 THE COURT: If the court rules against the State, the
15 State can decide not to appeal like some of the other states
16 did.

17 MR. BARNES: Well, your Honor, all I can say is that
18 is a decision that will be made well above my pay grade, and
19 I'm happy to let that be the case.

20 THE COURT: Okay.

21 MR. BARNES: That wouldn't be my call. But -- you
22 threw me off a little bit, your Honor.

23 THE COURT: I'm sorry.

24 MR. BARNES: But the --

25 (REPORTER READ BACK REQUESTED PORTION)

1 MR. BARNES: I was going to say that the plaintiffs
2 accused the State ofchutzpah in its response for asserting
3 that a stay might provide protection for the plaintiffs. That
4 may be so. But if so, that reasoning was -- has been accepted
5 by more than one district court in determining to issue at
6 least a temporary stay.

7 That was true of the court in Wyoming last month after
8 the Supreme Court had denied cert in *Kitchen* when the *Long*
9 court essentially said, *I know I have a Tenth Circuit precedent*
10 *against me, I know cert has been denied, but the court is faced*
11 *with the reality that the stability in marriage -- that if*
12 *same-sex couples are going to have the right to marry, if*
13 *they're entitled to that, they need to get it once and for all*
14 *time and we don't need to give with the one hand while we take*
15 *away with the other.* And that is a concern that has motivated
16 other courts. And, your Honor --

17 THE COURT: Isn't that what might happen on the
18 national level, assuming the Supreme Court takes the Sixth
19 Circuit case and assuming the Supreme Court says, *You know*
20 *what, Sixth Circuit? You were right and everybody else in the*
21 *world was wrong?* What happens to all the marriages of people
22 who have been married since cert denied, since other stays were
23 lifted, since -- since DOMA? What happens? Since *Windsor*.
24 Since *Windsor*.

25 MR. BARNES: I think that it would -- my best answer

1 would be it would probably end up being a result of state law.
2 It would be a separate question in each state. I do know that
3 in the -- in the *Evans* case in Utah the federal court looked to
4 Utah state law to determine the retroactivity of statutes. And
5 as I understand the holding in that case, it was that the
6 same-sex marriage ban had been in place. The preliminary
7 injunction lifted it. Marriages occurred during the interim
8 when there was no stay.

9 When the Supreme Court entered the stay, the law
10 became effective again. The district court there said there's
11 no indication that Utah intended its same-sex marriage
12 prohibition to be retroactive. So, therefore, these marriages
13 were valid when they occurred and they're valid now. But I
14 think the essential point from that situation is that it
15 required a separate lawsuit, you know, to vindicate those
16 rights. And it was still only ultimately resolved when the
17 Supreme Court denied cert in the *Kitchen* case.

18 And there, again, you had -- you had, you know, the
19 Tenth Circuit, and here we don't have anything from the Fifth
20 Circuit yet. And so it does place us in a slightly different
21 situation. As I understand it, just today a district court in
22 South Carolina entered a temporary stay. I don't know all the
23 details, but I was just trying to catch up at lunch to see if
24 Judge Sotomayor or the court had done anything in the Kansas
25 case.

1 But the South Carolina court had entered a temporary
2 stay to allow the State to seek relief from the Fourth Circuit.
3 And that was true even though there was already a Fourth
4 Circuit precedent striking down bans on same-sex marriages.
5 Again, the State's in a different position here because there
6 is no Fifth Circuit precedent controlling.

7 THE COURT: I guess ultimately, though, the question
8 becomes how long does the State seek the stay assuming the
9 court rules against the State. I mean, we know that there's an
10 argument scheduled in the what I'll call the companion case as
11 I know it -- trust me, this one here is not tied to those two
12 at all -- but January the 5th. So that's almost six -- a
13 little bit less than 60 days. And, of course, the court will
14 have to rule after that point.

15 MR. BARNES: That's true, your Honor. We would ask --
16 the State asks that the court, if it was to rule against the
17 State, would enter a general stay pending the result of the
18 appeal and the result of the Fifth Circuit's resolution of the
19 issue.

20 Whether this case would then go -- I'm assuming it
21 would go up quickly. Whether or not expedited, you know,
22 handling might be granted, who knows. That would be the Fifth
23 Circuit's decision. But we do know that the Fifth Circuit has
24 in place a plan to resolve this issue in Louisiana and Texas
25 cases.

1 We know that they have a timetable set. The cases are
2 set before the same merits panel. Of course, we have no idea
3 who that is yet. But we know they're assigned to the same
4 merits panel. And as the court mentioned, that oral argument
5 is set for the 5th of January. Presumably, hopefully, the
6 court then would rule within two to three months after that,
7 maybe less, maybe more.

8 Considering the fact that it's one merits panel and
9 they've got all the arguments before them and they have the
10 benefit of all the other decisions and the reasoning and
11 rationales that the courts have applied on both sides,
12 hopefully, you know, the court will have plenty of things to
13 work with.

14 And so we would ask for a general stay. And at a
15 minimum, we would ask the court to enter a stay of at least two
16 weeks merely to allow the -- one, the clerks to prepare, and to
17 allow the State to seek a longer stay from the Fifth Circuit.
18 We believe, though, that when the court is making the decision
19 that will change the social fabric of the state, which this
20 will, we would urge caution at least -- you know, as far as the
21 stay is concerned -- and that -- as the other district courts,
22 the court in Wyoming and the court in South Carolina, the
23 courts in Florida have.

24 THE COURT: Have there been any -- have there been any
25 courts that did not grant stays and that later, I mean, there

1 was no problem with them not granting stays?

2 MR. BARNES: I'm not aware of any, your Honor, but I
3 am not going to profess to be an expert on every same-sex
4 marriage case that's ever come down because, as you know, there
5 are many.

6 I am not aware of any recently other than the cases in
7 the Ninth Circuit, Tenth Circuit, Fourth, Second Circuit,
8 et cetera, where they dissolved the stays that had previously
9 existed, where the Supreme Court dissolved the stays. And I
10 know that the parties in those cases then moved for a final
11 relief, final judgment since the stay had been lifted and that
12 that has been granted. I'm not aware of a situation exactly
13 like the court described.

14 But, again, because the Fifth Circuit does have -- is
15 poised -- really is poised -- this issue is squarely teed up by
16 the Louisiana and Texas cases. And to this point no same-sex
17 marriages have been permitted to occur in either Louisiana
18 since the court upheld the validity of the law or in Texas
19 since the court stayed the effect of the law.

20 We do think that the Fifth Circuit is likely to take
21 into account that Mississippi would then be the only state
22 within the circuit where same-sex -- that same-sex marriages
23 were being performed and recognized at a time when the court is
24 on the verge of taking up the issue through oral argument.

25 THE COURT: With respect to the Texas court, do we

1 know -- did that court articulate his reasons why he was giving
2 the stay? I mean, Texas is how many times bigger than
3 Mississippi? A lot.

4 MR. BARNES: I'm sorry?

5 THE COURT: Texas is how many times bigger than
6 Mississippi?

7 MR. BARNES: It is, your Honor.

8 THE COURT: And I assume populationwise, if you do
9 have -- you know, 3, 4, 5 percent of that population decides to
10 make a run on the clerk's office, that's probably half of the
11 population of the state of Mississippi.

12 MR. BARNES: Of course, you'd also presume that they
13 have a lot more clerks' offices and the ability to handle it.
14 But I actually looked at the transcript from the stay, the
15 injunction hearing, the stay hearing in the Texas case. And,
16 of course, that did occur before, you know, the Supreme Court's
17 decision to deny cert in several circuits. Happened back in
18 either January of this year or February.

19 And, essentially, the court didn't -- didn't really
20 explain this reasoning, but there the plaintiffs did not oppose
21 the stay. And there was really no -- it was -- seemed to be
22 accepted as a matter of common sense that, you know, that some
23 sort of stay at a minimum would be necessary to implement such
24 a change. But that stay has never been revisited and it hasn't
25 been lifted and it's still in place today.

1 And one thing that we can say that the Supreme Court
2 has shown in regards to same-sex marriage is that the Court,
3 one, is not going to take up the issue unless it absolutely has
4 to. Two, the Sixth Circuit creating a split probably means
5 that they will have to, but no one's going to dictate to the
6 U.S. Supreme Court, as you well know. And the Sixth Circuit
7 opinion also, though, pointed out the fact that there's not
8 just a split in ultimate result; you know, there's a split in
9 reasoning, as Mr. Matheny talked about, on the merits. And
10 there's no real clear consensus there.

11 THE COURT: And since there is this split on what type
12 of review and all that, couldn't the court have found that as a
13 reason in which to have granted cert to sort of decide whether
14 it would be heightened scrutiny or rational basis or rational
15 basis with a punch or whatever and --

16 MR. BARNES: Certainly, that's within the court's
17 power, you know. But, again, the court doesn't ask any of us
18 what we think it should do, and they're going to make up their
19 own mind. Obviously, we all know Justice Ginsburg, Thomas,
20 that in light of the Sixth Circuit decision, that there's more
21 urgency for the court -- there now is urgency for the court to
22 take up the issue.

23 We also know that the court often likes to let all the
24 circuits have a say. The court very well might wait to hear
25 what the Fifth Circuit has to say on the issue, what the

1 Eleventh Circuit has to say on the issue. You know, they like
2 to let the issues percolate before they -- before they take
3 them up.

4 But we do know without any doubt that the Fifth
5 Circuit has got to take up this issue. And we know that the
6 Supreme Court has shown that they are going to let the
7 individual circuits settle things for themselves so far. Since
8 they denied cert in the cases in early October, you know, the
9 court has -- seems to be taking a hands-off approach.

10 Again, we'll be watching with interest what happens in
11 the Kansas case. We don't think -- obviously, if the Supreme
12 Court granted a stay in the Kansas case, we think that would
13 favor our position here. On the other hand, you've already got
14 a Tenth Circuit, you know, precedent in place and you've got
15 the murky state law issues involved in that case. So I'm not
16 sure if they deny a stay that it would -- that it would affect
17 our -- the relief we're asking for that much.

18 But, again, essentially, we're asking the court -- the
19 State is taking a cautious approach. Let me start over. The
20 State is taking a cautious approach. We took a cautious
21 approach in filing this contingent motion in the event that the
22 court ruled against us.

23 THE COURT: You just filed it early, I mean, because
24 if I rule against you, this would have been coming next.
25 Right?

1 MR. BARNES: Yes, your Honor.

2 THE COURT: Yes.

3 MR. BARNES: Yes, it would have been. And, honestly,
4 we felt it prudent not to allow a gap to occur if that -- if
5 that happens.

6 THE COURT: Absolutely.

7 MR. BARNES: But, you know, to grant a stay is a
8 decision that's within the sound discretion of the court. And
9 we are asking the court, even should it decide to grant relief
10 to the plaintiffs, that the court exercise its discretion and
11 also, you know, exercise some caution in the immediate -- and
12 recognizing the immediate effects that would result from a
13 preliminary injunction if a stay were not entered.

14 I don't want to belabor the point. If the court has
15 other questions, I'll be happy, you know, to answer them. I
16 know you seem to have some questions of Mr. Teeuwissen, and
17 I'll be happy to let him address those. If there's anything
18 else specifically I can help the court with.

19 THE COURT: I would be interested in knowing -- we've
20 talked about -- and when Mr. Teeuwissen comes up, you can
21 probably think of other reasons. You talked about taxes,
22 for example. You mentioned taxes. You mentioned adoptions,
23 birth certificates, I guess.

24 MR. BARNES: Basically, all the things that -- I'm
25 sorry, your Honor.

1 THE COURT: No, no.

2 MR. BARNES: All the things that the plaintiffs were
3 asserting would be affected in their complaint, that they're
4 being -- each and every one of those regulatory schemes would
5 take some time for adjustment. Some of them would probably be
6 quick and easy. Some of them would be more complex.

7 THE COURT: You know, because right now all I see is
8 changing a form or identifying a different person for
9 retirement benefits for PERS. I think you can only put your --
10 I don't know. I think if you're not married -- it's assumed
11 that the person who will get your benefits is your spouse, I
12 think. But if you choose a -- if you designate a beneficiary,
13 you write that person's name in and that's a matter of a form.

14 MR. BARNES: Right. But, your Honor, again, it is my
15 understanding, though, that the computer systems which have to
16 process forms, et cetera, it's not quite that easy. It might
17 be that easy in sending in a form saying, *I'm changing my*
18 *beneficiary*, but for them to process it is something different.

19 But you brought up an interesting point, because some
20 of the harms that they described in the complaint are -- there
21 doesn't seem to be any chance that these particular plaintiffs
22 would suffer those harms.

23 For instance, the court asked questions about the
24 institutional or representational standing of the Campaign. In
25 the complaint the Campaign really says, *We have some*

1 *Mississippi members*, none are identified. As for the
2 individual plaintiffs, none of them have been identified as
3 public employees. None of them have been identified as
4 municipal employees. None of them have been identified as
5 having involvement in the state retirement or having state
6 health insurance. So there's no showing that any one of these
7 plaintiffs or any one that we know about specifically would be
8 affected immediately and irreparably.

9 THE COURT: They couldn't get married.

10 MR. BARNES: That's true, your Honor, but the point is
11 they're saying that there's immediate and irreparable harm that
12 needs to be remedied because of the state's conference of
13 benefits on, for instance, spouses of police officers killed in
14 the line of duty. Well, as far as we know, there's no police
15 officers involved in the case.

16 You discussed the parade of horrors, you know,
17 earlier on the merits. And they've sort of put a parade of
18 horrors out there too as regards to all the possible and
19 potential harms which could occur to any same-sex couple under
20 the appropriate circumstances. We would ask the court to look
21 more closely at the harms that might be suffered here. And
22 again, essentially, we think that the stability of marriage --
23 if same-sex marriages are ultimately upheld by the appellate
24 courts, you know, so be it, and, of course --

25 THE COURT: I guess my problem is, you know, you

1 talked about, *Okay. We don't do it by form. We do it by*
2 *computer.* The gender of a person, how is that relevant to
3 their name?

4 MR. BARNES: Well, I think -- again, your Honor, I
5 can't really speak to the specifics, but I know that in many of
6 the state's computer systems it has to be coded a certain way
7 or it has to be programmed a certain way, because it will
8 only -- it won't accept inputs that would violate the law, for
9 instance. So it's not just a matter of someone saying on the
10 form, well, yes, you can -- both spouses can be the same sex.
11 At least, that is my understanding. But, again, I am not the
12 best person to talk to you about the intricacies.

13 But I will say I think this is the first -- this is
14 the first place where -- or the first state or case where the
15 fact that there would be at least some -- some regulatory
16 issues which would have to be dealt with requiring some minimum
17 amount of time to get up and running, they've never seriously
18 been questioned. And, again, I wish I could give you -- the
19 court more specifics, but I'm not able to do so as I stand here
20 today.

21 But, again, we would just ask the court to consider
22 the impact that a preliminary injunction would have on
23 everyone, not just the litigants, but the public interest, and
24 view it in light of the fact that the Fifth Circuit is, in
25 fact, poised to resolve the issues. And we thank the court for

1 your consideration.

2 THE COURT: Thank you. Mr. Teeuwissen.

3 MR. TEEUWISSEN: May it please the court.

4 THE COURT: You may proceed.

5 MR. TEEUWISSEN: Your Honor, many have said that it
6 would be -- before a court in Mississippi seriously considered
7 same-sex marriage, it would be a cold day. It's a cold day.

8 THE COURT: It's supposed to be even colder tomorrow.

9 MR. TEEUWISSEN: It is -- it's truly humbling and an
10 honor to participate in a case such as this and participate in
11 this legal argument. And make no mistake, that's what we're
12 here about. This isn't some social commentary, religious
13 debate, moral debate. It's a legal argument. And as I
14 understand it, it's a narrow legal argument between the State
15 and the plaintiffs.

16 And as I've said in the pleadings filed on behalf of
17 Ms. Dunn, Hinds County takes no position whatsoever in their
18 argument. In fact, we take an even narrower position. And if
19 you'll give me a chance, I have two points to make with that
20 narrow position. And I think I'll be considerably shorter than
21 either side.

22 The first point, your Honor, is that Ms. Dunn's
23 duties -- and Ms. Dunn was sued in her official capacity, and
24 that's the same as suing Hinds County, as your Honor is aware.
25 I may use those interchangeably, but that's what I mean.

1 Ms. Dunn's duties are ministerial in nature. There's a
2 statutory scheme that says what she must do as a circuit clerk
3 when someone comes to apply for a marriage license.

4 Importantly, there's been some case law from around
5 the country with other clerks that reinforces that point.
6 Judge Crabtree on pages 14 and 15 of the *Marie v. Moser* opinion
7 said that the clerk's duties are ministerial. Likewise, the
8 Tenth Circuit in *Bishop v. Smith*, 760 F.3d 1070, 1092, said
9 that the clerk's duties are ministerial.

10 The reason I want to make this point, your Honor, is
11 that in paragraph 4 of the prayer for relief there is a request
12 for attorneys' fees for bringing this action. If your Honor is
13 to get to that point down the road, I want to make clear those
14 attorneys' fees should not come from Dunn or Hinds County. She
15 is merely following the law that is established in the State of
16 Mississippi.

17 And with all due respect to the plaintiffs, it's not
18 yet a clearly established right for a same-sex marriage in the
19 Fifth Circuit. And I say that again solely that if you get to
20 the issue of attorneys' fees at some later date, the
21 ministerial nature of Ms. Dunn's duties and the lack of a
22 clearly established right should mean that no attorneys' fees
23 should come from Hinds County.

24 That takes me to the second point, the stay. That's
25 really the only issue that Hinds County has. Interestingly

1 enough, Hinds County, Barbara Dunn is the only circuit clerk
2 sued in this matter. That raises a question of whether your
3 Honor can enter relief with respect to 81 other circuit clerks.

4 You can certainly invalidate the state's
5 constitutional provision and the state's statute that prohibit
6 same-sex marriage. Can you order circuit clerks who are not
7 before you then to allow -- or to register there? That's an
8 open question. I certainly would -- on behalf of Ms. Dunn
9 don't want to see her placed in a position where she's treated
10 differently than 81 other circuit clerks. And I would ask the
11 court to consider that.

12 Beyond that, if the court does not enter a stay, folks
13 come to Hinds County, request the marriage license, issued,
14 filed, and then at a later date the Fifth Circuit -- and Lord
15 knows I'm never going to try and predict the Fifth Circuit.
16 Been down there enough -- but let's say they reverse your Honor
17 and say that the provisions of Mississippi state law for
18 whatever reason are valid, has Ms. Dunn then by issuing
19 licenses violated the law in the interim?

20 If she has, she's subject to fine because under the
21 statutory scheme for issuing marriage licenses, if she doesn't
22 comply with the law, she can be fined between 50 and \$500.
23 But, more importantly, if she violates the law, she's subject
24 to removal from office. That is an irreparable harm.

25 And I don't profess to speak to what the State speaks

1 to, but I don't want to see Ms. Dunn, my client, placed in a
2 situation where arguably at a later date if something was to
3 happen in some unseen way find herself being accused of having
4 violated the law for trying to comply with this court's order.

5 THE COURT: Complying with the federal court order
6 would get her removed from office or get her sanctioned by the
7 State?

8 MR. TEEUWISSEN: Your Honor, you've asked the State
9 whether they would not appeal. I think we know who the
10 governor is. I think we know who's being sued. I don't want
11 to take a chance that somebody at the state level wouldn't come
12 back against my circuit clerk and say, *Yeah, you complied with*
13 *that interim federal order, but that got overturned, and you*
14 *shouldn't have done it.* You can't ask Ms. Dunn to be in that
15 position.

16 Now, I want to answer a question you asked previously
17 of the State. You said how long should the stay be in place if
18 you were to grant one. I think the answer's pretty simple.
19 That stay is in effect until the Fifth Circuit rules, whether
20 that's on the January decisions that are before it or this
21 case, period. I don't think you have a stay until the Supreme
22 Court resolves this. I think you have a stay until the Fifth
23 Circuit sets precedent.

24 If you look at what has occurred in the other circuits
25 and the other district courts, you kind of have court's

1 entering stays; and then once circuit precedent is established,
2 those stays are dissolved. That's it. I would ask that you
3 consider the same approach here.

4 If you are to invalidate the state's constitutional
5 provision and the state statute banning same-sex marriage,
6 enter a stay until the Fifth Circuit establishes circuit
7 precedent. At that time take the same approach that was taken
8 in West Virginia, was taken in other states and dissolve the
9 stay. I think that short --

10 THE COURT: When is Fifth Circuit precedent
11 established? After a three-judge panel rules or after --
12 assuming somebody asks for en banc consideration? When does
13 it -- when is precedent established?

14 MR. TEEUWISSEN: Your Honor, I think you're in a
15 better position to answer that than I am. You would have to be
16 comfortable with when you considered Fifth Circuit precedent
17 established. I certainly would follow by the court's guidance.
18 If we're looking at the Sixth Circuit, seems to be that a split
19 three-judge panel there has established precedent.

20 I think we could have precedent in the Fifth Circuit
21 as soon as February. If you have an argument in January, I
22 think you could see an opinion as soon as February and you
23 could establish precedent. In the meantime, what harm is to
24 the two couples that are before this court? One couple is
25 already legally married in Maine.

1 THE COURT: But can't adopt child that they either are
2 with or want. Right?

3 MR. TEEUWISSEN: Can't adopt it, but that has nothing
4 to do with Barbara Dunn. Barbara Dunn doesn't have anything to
5 do with adoptions. So that stay from that standpoint --

6 THE COURT: She won't give them the order to get
7 married, though.

8 MR. TEEUWISSEN: Excuse me?

9 THE COURT: She can't give them the order to get --
10 she can't -- she can't ministerially process their marriage
11 application.

12 MR. TEEUWISSEN: I agree, but I think the issue is
13 does it affect their marriage. And the answer is it does not
14 affect their marriage. The other couple is not married at all.
15 So there's no change in the status quo.

16 THE COURT: They want to get married.

17 MR. TEEUWISSEN: I understand they want to get
18 married.

19 THE COURT: They want to get married now.

20 MR. TEEUWISSEN: I understand that. And, quite
21 frankly, for somebody that's been married 21, 22 years, if they
22 want to have all the joy, not joy of being married, I think
23 you're welcome to it.

24 THE COURT: Yeah. I mean, with the benefits of
25 marriages comes all the sacrifices, the pains, the gains.

1 MR. TEEUWISSEN: And I certainly personally welcome
2 that. Having said that, whether they get those joys and
3 sacrifices and pains now or at some time period down the road
4 where Fifth Circuit precedent is established, again, they don't
5 have a clearly established right to be married until the Fifth
6 Circuit says they do.

7 And I think that's an important point. We're
8 presuming they have that right, but that right has not yet been
9 established in the Fifth Circuit. And the other circuits'
10 precedent isn't binding. And, of course, the Supreme Court
11 hasn't said you have a clearly established right. They kind of
12 sidestepped all around this.

13 Having said that, I go back to the concerns about
14 Barbara Dunn. I represent the circuit clerk -- I want to say
15 this carefully -- has some challenges in meeting her statutory
16 duties and has found herself called before our state's highest
17 court on several occasions in recent years in meeting her
18 challenges.

19 Should this be placed before her, she may find herself
20 again afoul of the law, not intentionally. But I think to
21 avoid that and avoid her finding herself either afoul of the
22 law in a criminal sense or because of management capacity, a
23 stay would prevent that sort of harm. And I think your Honor
24 understands what I'm saying without me articulating further.

25 Your Honor asked about forms. I think that's an

1 important question. That one, with all due respect to my
2 colleagues, goes to the State. The statutory scheme says that
3 Barbara Dunn enters the information that is required by the
4 State of Mississippi, Department of Health or Department of
5 Vital Statistics. So they would have to -- they being the
6 State would have to change the form. She and any other clerk
7 would presumably file the form that was then sent out by the
8 State. And I can't speak to those.

9 THE COURT: I mean, I assume the form only asks for
10 the name of the two people. And if somebody's name is Joe,
11 J-O-E, or J-O, what difference does it make?

12 MR. TEEUWISSEN: Again, I think you're asking the
13 wrong party, your Honor, because like you, I haven't had to
14 apply for one of those in 20-plus years. In fact, somebody was
15 talking about blood tests and all --

16 THE COURT: I thought they still required blood tests.

17 MR. TEEUWISSEN: Yeah. Well, I had those issues,
18 obviously. I don't know, but I'm saying that's a -- the
19 inquiry is more proper for the State. I think the -- that's
20 not a problem for the clerk. Let me be honest. The clerk is
21 going to do whatever the State says with respect to the form.

22 And I agree with your Honor, whether the name is Joe
23 with an E or J-O for Jo, I don't think that affects the clerk.
24 It doesn't place an additional burden or obligation on the
25 clerk. The clerk -- and I would presumably say this not just

1 for Ms. Dunn, but all 82 circuit clerks -- is simply going to
2 complete whatever form the State of Mississippi says complete,
3 period. That once a month under the statute she has to turn
4 those forms into the State, period.

5 THE COURT: And let me ask you this. Well, I could
6 defer this question to the State, but it could not be a run on
7 the Hinds County from people who did not reside in Hinds
8 County.

9 MR. TEEUWISSEN: Yes, it could.

10 THE COURT: Isn't that correct? Oh, it could.

11 MR. TEEUWISSEN: Yes. Interesting -- your Honor used
12 to serve as a special master in chancery court, correct, as I
13 recall? To get divorced in Mississippi, you must live in the
14 county where you're seeking a divorce for six months next
15 preceding the divorce. To get a marriage license, you can show
16 up at any circuit clerk's office anywhere as long as you reside
17 in the state of Mississippi.

18 So there could be a run on Hinds County. And,
19 arguably, if some other circuit clerk -- and I don't presume to
20 know what 81 other circuit clerks would do, would say, *I'm not*
21 *subject to this case. I'm not made a party* or something like
22 that, you could see people then from Madison, Rankin or
23 wherever say, *Okay. We'll go to Hinds County because that*
24 *clerk was a party to that.* So I do think there could be some
25 sort of run.

1 And, again, I would remind the court of the challenges
2 that the clerk's office has had in maintaining records, court
3 files, transcripts and all those sorts of things. And it would
4 be an unfair burden to place on the clerk some sort of run like
5 that.

6 Again, this is a very narrow argument, your Honor.
7 We're staying far away from the merits of this case. And we
8 just ask that the court consider a stay with respect to the
9 unique situation that Ms. Dunn may find herself in as opposed
10 to 81 other circuit clerks and certainly as opposed to -- if
11 there's a change in the law and she issues something pursuant
12 to your Honor's order, presumably, but the law changes, that
13 she may find herself then at the mercy of other state officials
14 who may have agendas that are different than those parties who
15 are here before you.

16 THE COURT: So should the -- so should the plaintiffs
17 have sued the other 81 circuit clerks?

18 MR. TEEUWISSEN: Your Honor, I don't -- I don't want
19 to tell the plaintiffs how to do their case. They're very good
20 lawyers. They made a choice, obviously, as to how they wanted
21 to proceed and that was their choice.

22 THE COURT: Okay.

23 MR. TEEUWISSEN: And it may be that, quite frankly,
24 everybody wants to come to Hinds County, get married. And
25 considering the county's finances, that may end up being good.

1 We do get to collect a small fee.

2 THE COURT: How much time does it take do you know for
3 the clerk to issue the marriage license?

4 MR. TEEUWISSEN: I think --

5 THE COURT: And I guess I asked that sort of a
6 compound sort of question. Individually, how many --
7 approximately how many is the clerk doing on a -- they have
8 a -- do they keep up with the number on a weekly or monthly
9 basis or quarterly basis?

10 MR. TEEUWISSEN: Obviously, they keep up with the
11 number, as does the State. I did not ask that question. I
12 would presume that Hinds County as the largest county does
13 considerably more than any others. One thing that our
14 neighboring counties tend to forget is how much larger we are.
15 You put Madison and Rankin together, you get the population of
16 Hinds. That just gives you an example.

17 And, certainly, if there was a question as to whether
18 other clerks could issue licenses, then I think you'd not only
19 get the Hinds population, but folks from other parts of the
20 state coming to Hinds County.

21 One thing that I found interesting that's not alleged
22 in the pleadings, I was somewhat curious -- it's more than just
23 curiosity -- I don't know whether these plaintiffs reside in
24 Hinds County. They don't have to by statute. They can come
25 here. But it is interesting, are they Hinds County residents

1 or have they chosen to come here for the very purpose of trying
2 to register to marry?

3 Now, there is a short waiting period, as I understand
4 it. There is a three-day challenge period. It's at least
5 three days between when you can -- when you file your -- for a
6 marriage license and when you get it. There is some sort of
7 archaic three-day challenge period where you, I, these good
8 folks, anybody who wants to go and file a marriage license, any
9 other member of the public can supposedly go and challenge
10 their marriage license and file something with the circuit
11 court. So there is that three-day waiting period.

12 THE COURT: Do you know from Ms. Dunn or otherwise how
13 long does it take to process the couple who comes in on a
14 particular day?

15 MR. TEEUWISSEN: It's my understanding it's very
16 short. It's probably a 15- or 20-minute process to process
17 them. And, again, then once a month Hinds County has some
18 amount of time that it takes because it compiles these and
19 submits these to the State and it only has to do that once a
20 month. So about 15 or 20 minutes. It's a fairly short
21 process.

22 THE COURT: Okay.

23 MR. TEEUWISSEN: Yes, sir.

24 THE COURT: All right.

25 MR. TEEUWISSEN: Any other questions, your Honor?

1 THE COURT: No, sir. Thank you, Mr. Teeuwissen.

2 MR. TEEUWISSEN: Hopefully, to paraphrase Matthew, I
3 stuffed a camel through the eye of a needle. Thank you.

4 MS. KAPLAN: Thank you, your Honor. Your Honor, let
5 me begin by saying I want to thank everyone for the incredible
6 welcome we've had here in Mississippi. Mississippi --

7 THE COURT: It's the hospitality state.

8 MS. KAPLAN: The hospitality has been so wonderful
9 that they've even brought our cold weather here down south to
10 make us feel more at home.

11 I have to say I'm somewhat perplexed by the State's
12 argument with respect to injury to the State and as I also can
13 hear in some of your Honor's questions. When someone gets
14 married, they're married. And for purposes of taxation,
15 benefits, other sets of laws, the crucial question is whether
16 they're married or not. And if they're married, the State
17 should process the married couple the same way it would process
18 any couple. And so there seems to be something about the
19 State's understanding here that somehow the marriages of gay
20 couples would somehow be different.

21 The facts are that they would not. The experience in
22 other states is that they are not. The State of New York,
23 for example, didn't pass -- didn't make one change to one other
24 law other than the law that allowed gay couples to marry. And
25 there had to be no changes in regs. I think the only change

1 I'm aware of are changes on forms where they changed the gender
2 from "husband" and "wife" to "spouse." That's the change that
3 needed to be made.

4 So I'm not sure I understand what the State is talking
5 about here. And, frankly, since this is their motion, I don't
6 really think they've made the necessary showing. They haven't
7 really made any showing.

8 Computers, as your Honor pointed out, don't seem to
9 know the difference between someone's gender, as far as I'm
10 aware. Maybe someone's invented a computer that does that,
11 but, certainly, the state's computers probably don't do that.
12 And with respect to taxes, frankly, there arguably would be
13 less of a burden to the state because if couples start getting
14 married, they're going to file joint returns. So there's less
15 returns for the state to process.

16 And tax deduction goes to the issue of irreparable
17 injury because if a couple can't be married, then they're going
18 to have to pay -- they don't get deductions, so they have to
19 pay higher taxes now, where if they can get married now, they
20 will be able to get those deductions. So, again, I'm not sure I
21 understand that argument at all.

22 Now, let me turn -- I'm going to take some of these
23 arguments a bit out of order, your Honor. Let me turn to Utah.
24 I respectfully could not disagree more strongly that what
25 happened in Utah was chaos. What happened in Utah is how

1 constitutional litigation in this great country of ours
2 happens. And, frankly, all those people who were married in
3 Utah are married today.

4 And in Utah today gay couples are getting married
5 every single day, and it hasn't burdened the budget of the
6 State of Utah. It hasn't thrown things out of whack in the
7 State of Utah. I'm not aware that any clerks in the state of
8 Utah have been subject to any kind of personal liability.

9 And so what happens in the state of Utah is what
10 happens in our great constitutional system when rights get
11 recognized and when litigation happens. Moreover if by -- I
12 don't think it will happen, obviously, given who I am. But if
13 the Supreme Court were somehow to accept the appeals in the
14 Sixth Circuit and then affirm the Sixth Circuit's decision,
15 those people in Utah would still be married. It's res judicata
16 in those cases.

17 Those appeals were denied cert by the Supreme Court.
18 And if the State of Utah wants to unmarry those people, it's
19 going to have to pass a new law that -- in order to again
20 prevent gay couples from marrying. And I don't know what will
21 happen in Utah, but I would venture to say that if that
22 happens, a lot of states actually won't pass that new law.

23 Now, while counsel talked about the standard that
24 applies -- the Fifth Circuit standard that they talked about,
25 it's on page five of their brief, the problem with those

1 cases -- they're not talking about this issue in the context of
2 a preliminary injunction. And for the reasons that we have
3 discussed and we set forth in our brief, in a situation where a
4 party is seeking a stay from the issuance of a preliminary
5 injunction is a unique situation because the district court has
6 already held that there's a probability -- likelihood of
7 success on the merits. And courts have held it's actually
8 inconsistent then for the same court having held that and that
9 the preliminary injunction is warranted to then stay that
10 decision.

11 Now, your Honor asked about whether there were states
12 where no stays were issued, and there were. According to my
13 list, it includes Arizona, Alaska, North Carolina, Michigan,
14 Pennsylvania and Oregon. Short stays were issued to allow the
15 parties to seek a stay from the appellate court: In Kansas,
16 seven days; Wyoming, six days; and South Carolina, which just
17 came out today, which was a seven-day temporary stay.

18 THE COURT: Do you think any sort of stay would be
19 appropriate in this case?

20 MS. KAPLAN: We do not.

21 THE COURT: Four days? Seven days?

22 MS. KAPLAN: If your Honor --

23 THE COURT: 14 days?

24 MS. KAPLAN: -- were to issue a stay, I mean, I
25 would -- only a short stay to allow them to go -- again, to go

1 to the Fifth Circuit, a very short amount of time, something
2 like four or five, six days.

3 With respect to the irreparable harm to the State, as
4 I said, the showing is very, very weak. And, again, *Loving*
5 keeps coming to mind today and I think a consideration of
6 *Loving* is appropriate here too. It's not my understanding that
7 when *Loving* was decided that the State of Virginia had to go
8 through some huge administrative expense to allow white people
9 to marry black people. And, again, the same thing would happen
10 here. I just don't understand what the State is talking about.

11 However, in terms of the equitable issues that are
12 before the court on a stay, comparing the harms, as your Honor
13 I think has acknowledged, the harms to the plaintiffs and to
14 gay couples in Mississippi are serious.

15 THE COURT: Let's separate the two.

16 MS. KAPLAN: Sure.

17 THE COURT: Let's talk about the plaintiffs in this
18 case.

19 MS. KAPLAN: Sure.

20 THE COURT: What is so unique about the plaintiffs
21 that are before here --

22 MS. KAPLAN: That's --

23 THE COURT: -- the individual plaintiffs, not the
24 Campaign, but --

25 MS. KAPLAN: Sure. There's one thing -- let me start

1 out with the thing that's not unique. And the thing that's not
2 unique -- and I'm going to use an expression. I hope it
3 doesn't offend anyone -- but the truth is, your Honor, marriage
4 matters the most when -- I'm not going to use the word -- when
5 bad stuff happens. That's when marriage matters the most.
6 That's the truth about life.

7 So when is marriage most important? It's most
8 important when someone gets critically ill, because then you
9 have the rights you have. It's most important when someone
10 dies. That's when it's most important. And, frankly, it's
11 very important when you split up because then the kids have the
12 rights of the court proceedings for joint custody, support,
13 et cetera.

14 No one knows -- the one thing I know for sure about
15 life is that no one knows when that's going to happen to them.
16 It could happen to any one of these individual plaintiffs, God
17 forbid, tomorrow. And the reason that irreparable harm on our
18 part is such a strong showing here is that's -- I don't think
19 that's a disputable fact by the side, by the government, by
20 anyone else.

21 And so they have to live with day to day knowing that,
22 God forbid, if one of them gets hit by a car or if something
23 happens at the school and they have to go pick up their kid
24 from school, the one who's not the parent has to go pick up
25 their kid from school, they don't have the assurance that every

1 other married couple in the state has, that they have
2 protections of the laws and assurance of knowing that they will
3 be able to protect their families.

4 Now, that's not all. There was a talk -- let me --
5 it's not just those practical benefits. In our complaint, if
6 you look, we attach affidavits in our original pleadings. And
7 there's an affidavit from our clients Carla and Joce. And they
8 talk about the fact that there's -- in that affidavit at
9 paragraph 7 about how their six-year-old daughter urges -- has
10 urged them to get married. If your Honor will indulge me, I
11 want to tell the true story about that.

12 The true story is their six-year-old daughter came
13 home from school one day and said to their parents -- to their
14 two mothers, I don't understand how it is possible that you
15 could have children before you got married. And they had to
16 answer their daughter's question. Every day that goes by that
17 they can't give an adequate answer to that daughter's question
18 not only harms them in terms of their dignity, but harms the
19 dignity of their daughter.

20 So we're not only talking about contingency, about the
21 God-knows-what-will-happen-in-life things that we all deal with
22 every day, we're talking about the dignity of people knowing
23 that their families are their families, that their parents are
24 married, and that the State considers them like everyone else.

25 Now, with respect to other people in the state -- and

1 I concede that we don't have a class here and we don't have
2 other plaintiffs other than the named plaintiffs. Let me give
3 you an example. So I have actually reached out and spoken to
4 counsel for plaintiffs in the Texas case. And as my adversary
5 pointed out, the stay in that case was unopposed. But he is
6 not -- to use a proverbial expression, he is not a happy camper
7 right now.

8 And the reason he's not a happy camper right now, I
9 think he's quite upset that he agreed to a stay, is because the
10 Fifth Circuit, frankly, has dragged it out. It's a -- it's
11 supposedly expedited, but it's not expedited the way things
12 would be expedited in New York City. The case has been pending
13 for a long time. He's got a client who's about to give birth,
14 and she really, really, really wants to be the mother of the
15 child and have her spouse or her partner be the other mother of
16 the child when that child is born. So that's the kind of issue
17 that faces gay couples in Mississippi.

18 In addition, there are gay -- I know for a fact that
19 there are gay couples in Mississippi, some of whom were public
20 employees, who face life-threatening injuries or
21 life-threatening illnesses. And if they die in the next few
22 days, God for -- again, God forbid, they won't have the
23 benefits that they would get under state law for -- you know,
24 for -- not Social Security, but for pension benefits,
25 et cetera.

1 So this isn't some theoretical thing. I don't have to
2 show you it's real. You're a human being, your Honor.

3 THE COURT: Because those pension benefits only pass
4 to --

5 MS. KAPLAN: Exactly.

6 THE COURT: -- the spouse. Is that the reason?

7 MS. KAPLAN: Yeah, exactly right. Exactly right.
8 You're a human being, your Honor. We're all human beings. We
9 all know what life is like. We all know what it brings. And
10 these are the kind of harms that these people face every day.

11 Now, in terms -- in addition, in terms of the Fifth
12 Circuit, you know, I heard my adversary saying that he wanted
13 your Honor to issue a stay, not even a temporary stay, but a
14 stay that lasted until the decision of the Fifth Circuit.

15 But I think it's very crucial and perhaps much more
16 telling about what he did not say, and that is I did not hear
17 him say that the governor of the state of Mississippi is
18 willing right now to stand up and say that if the Fifth Circuit
19 rules in favor of the rights of gay couples to marry, he will
20 engage in no further litigation in the state of Mississippi and
21 will allow gay couples to marry. Unless and until he makes
22 that representation, in my view the balance of the equities is
23 he has no right to ask for that kind of a stay.

24 (COUNSEL CONFERRED)

25 MS. KAPLAN: I'm told it is -- I'm told that there is

1 no longer a three-day waiting period for marriage. There was
2 Senate Bill 2851, effective July 1, 2012.

3 THE COURT: I would tell you I pulled that up on my
4 computer, but I didn't.

5 MS. KAPLAN: I'm just telling you what the note says,
6 your Honor.

7 THE COURT: Things happen in this case so fast. I
8 appreciate whoever that is.

9 MS. KAPLAN: Finally, with respect to some of the
10 discussion that we heard about Wyoming and other states like
11 that, I, frankly, your Honor -- and I'm trying to be as
12 diplomatic as I can -- I think what those efforts to seek the
13 stays and then the grant of the stay show is more about the
14 continuing misunderstanding of gay people and their
15 relationships than anything else.

16 After all, my adversary was talking about stays that
17 were sought in circuits where there was binding precedent. And
18 even when there was binding precedent, there were parties in
19 the political system who were willing to still go to court and
20 seek a stay. What that I think -- what that shows, your Honor,
21 I believe, is animus against gay people and nothing more.

22 With that, unless your Honor has questions, I will
23 close.

24 THE COURT: What other circuits are we waiting to hear
25 from? 11th. D.C.? Is D.C. one of them?

1 MS. KAPLAN: No. So, basically -- I'll go through
2 each circuit and let you know. So the Fifth is the -- we'll
3 start. The Sixth we know. I assume cert petitions will be
4 filed. The Fifth Circuit there is argument. It's actually the
5 week of January 5th. It could be that day; it could be some
6 other day that week.

7 The Eighth is way behind, and the Eleventh is way
8 behind. There are cases pending in the Eighth and the
9 Eleventh, but they are nowhere near being resolved. And then
10 the First Circuit is the only other circuit that now comes into
11 play because although all the other states in the First Circuit
12 already allow gay couples to marry, you have that case out of
13 Puerto Rico. And that will get appealed. That's in the First
14 Circuit.

15 Is that the current status? I'm looking at y'all.
16 Did I get that right?

17 That's the current status, as far as I know.

18 THE COURT: With respect to the individual plaintiffs
19 here -- I know we don't have a class yet -- are they public
20 employees? Is that --

21 MS. KAPLAN: No.

22 THE COURT: -- a worry? They are not?

23 MS. KAPLAN: No. None of them are public employees,
24 your Honor.

25 THE COURT: Okay. Could they -- with respect to the

1 awful contingency of death, could they prepare a will or is
2 that -- or would that be a burden? I mean, because, obviously,
3 you can get by without doing a will and die intestate and you
4 know how things will be parceled up.

5 MS. KAPLAN: Yeah, but we -- they could -- obviously,
6 the parties can prepare a will. Actually, one couple is -- one
7 of the women is out of a job. So for her right now probably
8 paying the legal fees -- I could speak for myself. Before I
9 was able to get married, I spent an awful lot of money in
10 New York trying to have agreements and wills and trusts and
11 things to protect my family.

12 And, presumably, people can do that, but it's quite
13 expensive. And I know that at least probably both, but
14 certainly one of the couples -- injured couples would not be
15 able to afford this at this point in time. They have testified
16 in their affidavit that they don't even have the funds to go to
17 another state to get married.

18 Two more things I forgot, and I apologize for
19 forgetting. With respect to Ms. Dunn, what I've seen in other
20 states on this is that once a decision by a federal court is
21 issued, the clerks of the counties generally follow the federal
22 court order. We have the supremacy principle in the United
23 States. And there haven't -- there have been a couple of
24 outliers that haven't been clerks protesting, massively
25 refusing to follow a decision of a federal court.

1 With respect to attorneys' fees, I'm going to be quite
2 clear now. Paul Weiss and Mr. McDuff's firm are doing this
3 entirely pro bono, and we waive completely any application for
4 attorneys' fees. So that would not be an issue. Anything
5 else, your Honor?

6 THE COURT: No. Thank you.

7 MS. KAPLAN: Thank you.

8 MR. BARNES: Very briefly, your Honor. I also had
9 pulled up the statute and had a copy of it and was going to
10 also inform the court the three-day waiting period, in fact,
11 had been removed two years ago. However, I do notice the
12 statute still makes a difference between males who can only get
13 married when they're 17 and females who can get married when
14 they're 15. So I don't know, you know, where we might be with
15 that situation in the future if marriage is an unrestricted --

16 THE COURT: Then males would have to be 17 and the
17 females would have to be 13 (sic).

18 MR. BARNES: That might be, your Honor. In the event
19 there was some unforeseen personal emergency, personal
20 circumstance, under Rule 62 this court would always retain
21 jurisdiction to modify an injunction while a case is on appeal.
22 Even though the normal rule is that the district court and the
23 Court of Appeals cannot have jurisdiction at the same time,
24 that is an exception under Rule 62.

25 What happened in Utah is not speculation. It's not

1 guesswork. It is fact. And, in fact, in Utah clerks in
2 different counties were confused and didn't know what to do.
3 Some clerks began issuing licenses; others didn't. Then they
4 received conflicting instructions from various state officials.

5 The court specifically talked about adoption, and
6 adoption is an issue here with one of the couples. In Utah
7 what happened was one of the same-sex couples got married and
8 tried to adopt their son. Same situation we have here. The
9 partner was forbidden by state law to adopt the child until the
10 ban was struck down.

11 State adoption proceedings began in court. The court
12 entered an order for -- and the couple took the -- took the
13 order to the department of health or vital statistics -- and in
14 Mississippi, vital statistics is under the umbrella of the
15 state department of health. They went to get a new birth
16 certificate based on the adoption order.

17 The vital statistics department there declined to
18 issue it because there was confusion. That is what led to the
19 state judge issuing a show cause order against the department
20 of health as to why they were not issuing a birth certificate.
21 And that court then -- the State had to appeal, and the state
22 supreme court had to tell the adopt -- the court in the
23 adoption court to stay the effect.

24 So it's not just a matter of we've got a judge who
25 would oversee a process. It's the fact that there are various

1 steps that have to take place in that process. And at any time
2 if there's no stay, if a stay then comes down later, where are
3 you in that process? What happens to the relationships, family
4 relationships, marital status, marital relationships which
5 occur in the interim? How does the court unwind those
6 relationships if -- if necessary? And it's not as easy an
7 issue as opposing counsel would like to say.

8 THE COURT: But what about the issue with respect to
9 the harm to the plaintiff who can't visit their spouse in the
10 hospital or the -- I don't know what the regs are at UMMC,
11 for example. You know, you're in serious injury, you're in
12 intensive care and only your immediate family --

13 MR. BARNES: Well, your Honor, as you pointed out --
14 you asked the question before -- problems of estate planning
15 can be addressed by a will. Problems with the ownership of
16 property can be --

17 THE COURT: But that costs money.

18 MR. BARNES: Well, it does, your Honor, but it costs
19 money to everyone. But advanced healthcare directives are
20 another way. There's a simple form in which one can fill out
21 advanced healthcare directive that you can give another person
22 the right to make decisions if that person is incapacitated, if
23 someone has -- under state law, if someone has the power to
24 make healthcare decisions, then they are --

25 THE COURT: What is so unique about marriage to the

1 State then if anybody can do --

2 MR. BARNES: It's presumed -- it is presumed that --
3 that a spouse has that right. There are situations where,
4 actually, it is -- the same-sex -- I mean opposite-sex couples,
5 traditional marriages where the spouse doesn't trust their
6 other spouse and they go out and get an advanced healthcare
7 directive and give it to one of their children. So that has
8 happened to me in private practice where I've had to deal with
9 that. But, again, the issue of property, ownership of the
10 home, you can just -- a deed, advance healthcare directives,
11 contracts. And so --

12 THE COURT: But those are steps that an opposite-sex
13 couple would not have to do. Right?

14 MR. BARNES: That is true, your Honor. But at this
15 point the harm that would result from a stay would be no
16 greater than has occurred heretofore. Now -- and, again, I'm
17 not saying there is no harm, because we're not taking that
18 position, but it's -- certainly, a stay would not increase the
19 harm in any way other than a length of time. And with the
20 Fifth Circuit prepared to act, we think that it is reasonable
21 to believe that that would be a relatively short time.

22 THE COURT: But I can't tell the Fifth Circuit when to
23 rule.

24 MR. BARNES: No, your Honor, you can't, and --

25 THE COURT: I can only try to expedite my ruling,

1 and -- whatever it is, and that ruling would be subject to it
2 being reviewed by a higher court. Right?

3 MR. BARNES: That is true, your Honor. And we
4 certainly respect the authority of this court to issue the
5 ruling it sees fit. But, again, we'd ask the court in its
6 discretion to enter a stay should the court find that
7 injunctive relief is appropriate.

8 THE COURT: The plaintiff mentioned that the -- so far
9 the State has not placed on the table the issue of finality at
10 the -- because we are talking about the Fifth Circuit, the
11 precedent of the Fifth Circuit, the precedent of the Fifth
12 Circuit. Is the State in a position to say that once the Fifth
13 Circuit rules, that would -- that the State would honor the
14 ruling of the Fifth Circuit precedent?

15 MR. BARNES: No, your Honor. I can't say that today.
16 Obviously, I'm not the governor of Mississippi. I'm merely
17 representing him today. No. I could not make that
18 representation. And that decision would have to be made by the
19 governor and the attorney general, you know, in the
20 circumstances at that time.

21 So, no, we're not in a position to do that. But I
22 don't think that there -- there are often counsel in these
23 cases who have been in that position, and there have actually
24 been very few courts -- I mean, very few states where the
25 public officials have stopped trying to defend their laws, at

1 least to the point of seeking a stay at the U.S. Supreme Court.

2 THE COURT: I think that -- I think the attorney

3 general of Virginia --

4 MR. BARNES: Sir?

5 THE COURT: I think the attorney general of Virginia

6 decided not to defend the case at the Fourth Circuit level, I

7 think.

8 MR. BARNES: And there have been some, your Honor.

9 But, no, we are not in a position to say that the State would

10 do that. And I would say my best answer now is I believe the

11 State will fully defend the validity of its laws and

12 constitution. And that's the best answer I can give to you

13 here today.

14 THE COURT: The plaintiffs contend that might show

15 some signs of animus.

16 MR. BARNES: Your Honor, we are bound by statute,

17 especially here in the Attorney General's Office, to defend --

18 and by statute, to appear and defend the laws of the state; and

19 that is exactly what we're doing. So to suggest that it is

20 animus that we're doing our job, our statutory duty to defend

21 the laws to the best of our ability is inappropriate; and we

22 don't think it's true.

23 And I can't speak to elected officials who are, you

24 know, my superiors; but I don't think it's evidence of animus.

25 I think it's evidence that the public officials recognize their

1 duty to the citizens of Mississippi to defend the will that
2 86 percent of the citizens voted on.

3 THE COURT: That gets you to a whole other can of
4 worms about that 87 -- just because 86 percent of the people
5 vote to do what could be a harmful thing to a suspect class,
6 i.e., take away the vote against another group of individuals.
7 Hopefully, the attorney general would not seek to defend that.

8 MR. BARNES: Your Honor, you're now -- you're putting
9 me in a situation where -- no, we're not -- that -- now it's a
10 parade of horrors. What I would suggest was just that that
11 was ten years ago. And the same-sex marriage and gay rights
12 movement has gained a lot of steam in the last ten years. So
13 it is speculation to say what might result if that issue came
14 up before. So, no, your Honor.

15 But the law -- the state law is the law of this state,
16 and we are required to appear and defend it. And the -- all
17 public officials in this state take an oath to support and
18 defend the laws and Constitution of the United States, the
19 State of Mississippi. So we have those obligations and we must
20 fulfill them. That's what we're trying to do.

21 THE COURT: And this court has the obligation to
22 defend the United States Constitution.

23 MR. BARNES: Absolutely, your Honor. And we certainly
24 are not asking the court not to.

25 THE COURT: Thank you, Mr. Barnes.

1 MS. KAPLAN: Your Honor.

2 THE COURT: Ms. Kaplan.

3 MS. KAPLAN: Very briefly. I just want to be clear,
4 we're not arguing that the State of Mississippi is showing any
5 animus. What we're arguing is that for the State of
6 Mississippi on the one hand to ask that this court should go so
7 far as to issue a stay pending a decision by the Fifth Circuit
8 on the one hand and on the other hand to say, *But we're not*
9 *telling you at that point that we'll let you get married.*
10 *We're saying that we could still do all kinds of stuff to try*
11 *to stop you from getting married,* that, to me, shows the
12 weakness of their arguments for the stay.

13 THE COURT: And the court misspoke. You connected the
14 animus to what the actions were in the other circuits where
15 there had been precedent and people were -- state officials
16 were still pushing it despite what their circuit court had
17 already found and determined.

18 MS. KAPLAN: Exactly, your Honor. Thank you.

19 THE COURT: All right. Thank you. I wanted to make
20 sure everybody understood that I was listening. Just misspoke.
21 Is there anything further from the parties?

22 MR. BARNES: Not from the State, your Honor.

23 MS. KAPLAN: Not from plaintiffs, your Honor.

24 MR. TEEUWISSEN: Not from Hinds County, your Honor.

25 THE COURT: Okay. Ladies and gentlemen, thank you for

1 your spirited arguments today. The court will take this matter
2 under advisement. I realize we expedited and got this matter
3 on the docket on an expedited fashion, and the court intends to
4 rule as soon as possible. I don't know all 122 cases that have
5 just come down in the last three months, but I'm trying to
6 learn all 122 of them. Thank you all so much.

7 MS. KAPLAN: Thank you, your Honor.

8 (PROCEEDINGS CONCLUDED)
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1 CERTIFICATE OF REPORTER
2

3 I, MARY VIRGINIA "Gina" MORRIS, Official Court
4 Reporter, United States District Court, Southern District of
5 Mississippi, do hereby certify that the above and foregoing
6 pages contain a full, true and correct transcript of the
7 proceedings had in the aforementioned case at the time and
8 place indicated, which proceedings were recorded by me to
9 the best of my skill and ability.

10 I certify that the transcript fees and format
11 comply with those prescribed by the Court and Judicial
12 Conference of the United States.

13 This the 17th day of November, 2014.

14
15 s/ Gina Morris
16 U.S. DISTRICT COURT REPORTER
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